Supreme Court, U.S.
FILED
AUG 16 1999
OFFICE OF THE CLERK

No. 99 451

IN THE SUPREME COURT OF THE UNITED STATES

GAIL LEWIS, Warden, et al., *Petitioners*,

v.

JESUS GARCIA DELGADO, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

People v. Wende, 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (1979) applied *Anders v. California*, 386 U.S. 738 (1967), in which this Court held that appointed criminal appellate counsel seeking to withdraw from a frivolous appeal must file a brief referring to anything in the record that might arguably support the appeal. *Wende* approved no-merit briefs that include a statement of the procedural and historical facts but no specification of frivolous legal issues and held that the state court of appeal must independently review the record in such cases for error. Approximately 1,500 criminal appeals a year are processed under *Wende*. The questions presented are:

1. Is the form of no-merit brief approved in *Wende* contrary to or an unreasonable application of *Anders* under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)?

2. Is a habeas petitioner who claims ineffective assistance of counsel because his appellate counsel filed a *Wende* brief required to show prejudice?

3. Does § 2254(d) mandate deference to a merits denial by a state court that does not articulate reasons for its determination?

LIST OF PARTIES

Gail Lewis, Warden of the Pleasant Valley State Prison in California, et al. are the Petitioners in this federal habeas corpus proceeding.

Respondent is Jesus Garcia Delgado, who was convicted of manufacturing methamphetamine, possession of chemicals with intent to manufacture methamphetamine, possession of methamphetamine for sale, as well as a quantity enhancement, resulting in a term of fifteen years in state prison.

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IN THE SUPREME COURT OF THE UNITED STATES

No.

GAIL LEWIS, Warden, et al., *Petitioners*,

v.

JESUS GARCIA DELGADO, *Respondent*.

Gail Lewis, et al. (Petitioners), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed the United States District Court, Central District of California's (district court) conditional grant of a writ of habeas corpus vacating the conviction of Respondent Jesus Garcia Delgado (Delgado) unless he is afforded a new state appeal.

OPINION OR JUDGMENT BELOW

Judge Thomas' amended opinion for the United States Court of Appeals for the Ninth Circuit appears at Appendix A to the Petition, and is reported at 181 F.3d 1087 (9th Cir. 1999). The original opinion appears at Appendix B and is reported at 168 F.3d 1148 (9th Cir. 1999). The unreported opinion of the district court appears at Appendix C to the Petition. The California Supreme Court's denial orders appear at Appendix D. The California Court of Appeal's unreported affirmance of Delgado's conviction can be found at Appendix E.

STATEMENT OF JURISDICTION

The United States Court of Appeals issued an amended Opinion on June 23, 1999, and denied Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc that same day. This Petition for Writ of Certiorari follows within ninety days. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONS, STATUTES OR REGULATIONS

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI.

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a).

Section 2254 as amended by the AEDPA provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – [¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

> States; or [¶] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

In 1995, Delgado was convicted and sentenced to state prison after he pled guilty to manufacturing methamphetamine, possession of chemicals with intent to manufacture methamphetamine, and possession of methamphetamine for sale, and admitted a quantity enhancement. Pursuant to the plea agreement, Delgado agreed to a maximum of fifteen years in state prison. The trial court imposed a fifteen year term.

On direct appeal, Delgado's attorney filed a brief pursuant to *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839, and Delgado filed a supplemental brief. The California Court of Appeal independently reviewed the record, considered the claims in Delgado's supplemental brief, and affirmed the judgment, concluding there were no arguable issues. Appendices E and G. The California Supreme Court summarily denied review. App. D.

In May 1996, Delgado filed a Petition for Writ of Habeas Corpus in the California Supreme Court, claiming ineffective assistance of trial and appellate counsel. Delgado alleged that when he signed the plea agreement, a defense investigator promised him he would receive credit for time served rather than fifteen years in prison, and no one spoke on Delgado's behalf at the sentencing hearing. Delgado also argued appellate counsel failed to raise these issues and failed to provide Delgado with the appellate record. The California Supreme Court summarily denied the Petition in August 1996. App. D.

In October 1996, Delgado filed a Petition for Writ of Habeas Corpus in the district court pursuant to 28 U.S.C. § 2254. The Petition alleged Delgado's constitutional rights were violated on direct appeal. Specifically, Delgado alleged his appellate counsel had been ineffective, because he "only" filed a *Wende* brief and failed to raise the issues Delgado desired to be raised, and failed to provide Delgado with the appellate record.

In June 1997, the district court concluded that Delgado was entitled to relief on the claim of ineffective assistance of appellate counsel. The court conditionally granted Delgado's Petition for Writ of Habeas Corpus on the ground that appellate counsel was ineffective for failing to meet the standards of *Anders v. California*, 386 U.S. 738 and ordered Delgado discharged from custody unless the California Court of Appeal accepted jurisdiction over Delgado's direct appeal and appointed counsel within sixty days. App. C.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. Pursuant to the district court's Order, the California Court of Appeal took jurisdiction and appointed counsel, reinstating the state court direct appeal. Petitioners obtained a stay of those proceedings from the California Court of Appeal, pending the Ninth Circuit proceedings.

On February 23, 1999, the Ninth Circuit issued a unanimous published opinion, affirming the judgment based on the ineffective assistance of appellate counsel. The court found: (1) Delgado exhausted his state remedies; (2) the California Supreme Court's summary denial required no deference under AEDPA, because the California Supreme Court failed to provide any reasons for its conclusions; (3) appellate counsel was constitutionally deficient for failing to raise any arguable issues on direct appeal (a finding that California's *Wende* procedure is constitutionally deficient); and (4) prejudice

is presumed from appellate counsel's failure to raise any arguable issues on appeal. App. B.

Petitioners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on March 8, 1999. Petitioners argued the panel incorrectly held a state court summary denial is not entitled to deference under § 2254(d), and also argued the panel incorrectly held that California's *Wende* procedure fails to comport with *Anders*.

On June 23, 1999, the Ninth Circuit withdrew its Opinion and issued an amended Opinion. The Opinion did not deviate from the original Opinion's language regarding the *Wende/Anders* issue, nor the conclusion that prejudice is presumed from appellate counsel's deficiency. The Ninth Circuit amended the original Opinion by deleting the assertion that de novo review is required when a state court fails to provide reasons for its decision. However, the amended Opinion still maintains that under § 2254(d), a federal court cannot review a state court's application of clearly established federal law in the absence of a reasoned opinion, and, thus, an independent review of the record is required. The Ninth Circuit added footnoted material that asserts an independent review of the record is not the equivalent of de novo review. The Ninth Circuit also relegated to a footnote its assertion in the original Opinion that less deference to state court decisions is sometimes appropriate.

The Ninth Circuit denied Petitioners' Petition for Rehearing and rejected the Suggestion for Rehearing En Banc in light of the amended Opinion. Petitioners filed a Motion to Stay the Mandate pending the filing of this Petition for Writ of Certiorari. On July 12, 1999, the Ninth Circuit granted a stay of the mandate until August 16, 1999. Apps. A and F.

E. Introduction

The Ninth Circuit's Opinion invalidates California's nearly twenty-year-old procedure (the *Wende* procedure) for handling the more than 1,500[1] no-merit indigent criminal appeals that are filed annually. In *Wende*, the California Supreme Court held the *Wende* procedure comports with *Anders*. Thus, the Ninth Circuit Opinion in this case disagrees with the California Supreme Court on an important question of federal law. The Opinion engenders uncertainty about how to process pending appeals, and places the validity of the state's appellate process in doubt by inviting a parade of habeas petitions claiming that the state still has not adequately complied with *Anders*, as interpreted by the Ninth Circuit.[2]

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1. In fiscal year 1996-1997, counsel filed 7,774 opening briefs in criminal and juvenile appeals. 1998 Annual Statistical Report of the Judicial Council of California. Assuming that the previously identified percentages of no-merit briefs from two of the state's six appellate districts (20 percent and 24 percent, *People v. Hackett*, 36 Cal. App. 4th 1297, 1304 n.4, 43 Cal. Rptr. 2d 219, 224 n.4 (1995)) are representative and relatively constant, statewide more than 1,500 no-merit briefs were filed that fiscal year.

2. This Court has granted the state's Petition for Writ of Certiorari in *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1997), *cert. granted*, 119 S. Ct. 1139, 143 L. Ed. 2d 207 (1999), on the following questions: (1) whether the Ninth Circuit erred in finding California's no-merit brief procedure violated the Sixth Amendment right to the effective assistance of counsel under *Anders*; (2) whether the Ninth Circuit erred in ruling the *Anders* violation required a new appeal, without a showing of error under

The Opinion further concludes that if appellate counsel files a *Wende* brief, presumed prejudice results. The Ninth Circuit Opinion creates the potential for significant disruption in the state's appellate courts by announcing a rule that will require new appeals for defendants whose convictions are final.

The Ninth Circuit also interprets § 2254(d) differently from other United States Courts of Appeals.[3] The California Court of Appeal and California Supreme Court summarily denied Delgado's claims for relief. On federal habeas review, the district court conducted de novo review of the state court summary denials. The Ninth Circuit then held when a state court fails to provide any reasons for its decision, a federal court cannot review the state court's application of federal law. Thus, the federal court must conduct an independent review of the record. An independent review is the equivalent of de novo review, and thus is violative of § 2254(d)'s requirement of deference to state court decisions. The question of whether a state court summary denial requires deference or an independent review of the record arises

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Strickland v. Washington, 466 U.S. 668 (1984); and (3) whether the Ninth Circuit violated the rule announced in *Teague v. Lane*, 489 U.S. 288 (1989). The Ninth Circuit reiterated its invalidation of California's *Wende* procedure in the post-AEDPA case *Davis v. Kramer*, 167 F.3d 494 (9th Cir. 1999), pet. for cert. filed, March 9, 1999, No. 98-1427.

3. The meaning of the terms "contrary to" and "unreasonable application of" from § 2254(d) is currently pending before this Court in *Williams v. Taylor*, 163 F.3d 860 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1355 (1999), No. 98-8384, as is the relation between the rule announced in *Teague v. Lane*, 489 U.S. 288 and the AEDPA.

in every post-AEDPA federal habeas corpus case that involves a summary denial. As the number of petitions for review and habeas corpus relief filed in state supreme courts are considerable, and summary denials are commonplace, the issue will recur.[4] California faces a difficult choice following this decision: it can radically restructure its entire judicial system, by ceasing to issue summary denials, or it can forego deference on collateral review. This Court has expressed its disinclination to require state courts "to undertake something as fundamental as restructuring the operation of its courts." *Johnson v. Fankell*, 520 U.S. 911, 922, 922 n.13 (1997). With complete disregard for the very essence of the AEDPA -- deference to final state court decisions -- the Ninth Circuit has essentially insisted that the nation's most populous state should change its judicial processes, from the lower courts to the state's highest court. The Ninth Circuit opinion contributes further to the significant split of authority on the issue of what "deference" federal courts must accord state court summary denials on collateral review. The Ninth Circuit added an element which does not appear in § 2254(d), in that it requires a state court to provide reasons for denying claims, or the state court must forego deference to its decision.

This Court will consider in *Robbins* whether the Ninth Circuit violated *Teague* in invalidating California's *Wende* procedure. This Court will also consider in

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4. For example, 2,152 petitions for writ of habeas corpus were filed in the California Supreme Court during fiscal year 1997-1998. A total of 3,716 criminal petitions for review were filed in the California Supreme Court during that same fiscal year. A mere 3% were granted, granted and held, or granted and transferred. 1999 Annual Statistical Report of the Judicial Council of California, Tables 3 and 5.

Williams v. Taylor, whether § 2254(d) merely codified *Teague*, or went beyond *Teague*, requiring expanded protections for final state court decisions. If this Court concludes in *Robbins* the Ninth Circuit violated the rule in *Teague*, then certainly the Ninth Circuit violated the mandates of § 2254(d) in this case, as § 2254(d) limits federal collateral review of state court decisions at least as much as *Teague*. However, the Ninth Circuit's erroneous interpretation of § 2254(d)'s standard of review in this case renders it far more likely that state court decisions will be overturned on federal collateral review than prior to enactment of the AEDPA.

This Court has consistently recognized the significant societal costs associated with federal habeas corpus review. *Brecht v. Abrahamson*, 507 U.S. 619, 636-37 (1993); *Calderon v. Thompson*, 523 U.S. 538 (1998). The Ninth Circuit's authority over federal habeas corpus petitions is limited to that granted it by Congress. *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996). If federal courts continue to disregard Congress' clear mandate to accord deference to state court decisions, a significant number of cases, including death penalty cases, could require retrial, involving vast expenditures of resources and incurring the risk of lost evidence and witnesses. This Court should now settle the split among the circuits and decide this important question of federal law.

F. The Ninth Court Created A Significant Split Of Authority By Disagreeing With The California Supreme Court And Failing To Apply Properly The Limitations of § 2254(d)(1)

In *Anders v. California*, 386 U.S. at 738, the Court "established a prophylactic framework," *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), "designed to provide the appellate courts with a basis for

determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their ability." *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 439 (1988). To that end, when counsel concludes that an appeal is frivolous, that is to say, "lacks any basis in law or fact," *Id.* at 439 n.10, and therefore that counsel is "under an ethical obligation to refuse to prosecute" the appeal, *Id.* at 436, counsel may seek to withdraw and file not an advocate's brief but a brief that will "enable the court to decide whether the appeal is so frivolous that the defendant has no federal right to have counsel present his or her case to the court." *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. at 440 n.13. *Anders* held that the defendant may not be denied that right "based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal." *Penson v. Ohio*, 488 U.S. 75, 80 (1988). Instead, the attorney is to file "a brief referring to anything in the record that might arguably support the appeal." *Anders v. California*, 386 U.S. at 744.

The California Supreme Court applied *Anders* in *Wende*. There, counsel

> filed a brief which set forth a summary of the proceedings and facts with citations to the transcript, raised no specific issues, and called upon the court to make a thorough review of the entire record to determine for itself whether there were any arguable issues. Counsel submitted a declaration stating that he had advised defendant of the nature of the brief, that he would send defendant a copy of the brief, and that he had informed defendant that the court would permit him to file a brief on his own behalf. Counsel stated that he was not requesting to withdraw but that he would advise

> defendant that he could move to have counsel relieved if he so desired.

People v. Wende, 25 Cal. 3d at 438. The court concluded *Anders* required it to "conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous" and rejected the People's "assert[ion] that the approach taken by counsel in the opening brief did not satisfy the standards set forth in *Anders*." *People v. Wende*, 25 Cal. 3d at 441-42, 600 P.2d at 1074-75, 158 Cal. Rptr. at 842-43.

In holding that *Wende* is contrary to *Anders* because appellate counsel does not "'draw attention to "anything in the record that might arguably support the appeal,"'" Appendix A, the Ninth Circuit has created a significant split of authority with the California Supreme Court on the important federal question of the duties of appointed counsel. Had the Ninth Circuit properly applied the AEDPA, this split could have been avoided.

The Ninth Circuit initially erred in the instant case when it applied the "contrary to" prong of 28 U.S.C. § 2254(d)(1) instead of the "unreasonable application" prong.[5] The factual context presented by the *Wende* brief filed in Delgado's direct appeal is distinguishable from the no-merit letter submitted in *Anders*. In *Anders*, counsel submitted a three paragraph letter that told the court there was no merit to the appeal but provided no information about the facts and procedural history of the case, other than the fact that Anders had been convicted of possession of narcotics. Delgado's *Wende* brief contained not a bare assertion that the appeal was frivolous but an extensive statement of the procedural and

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5. As noted above, this Court will consider the meaning of the terms "contrary to" or "unreasonable application of" in *Williams v. Taylor*, 119 S. Ct. at 1355.

historical facts. *Cf. Penson v. Ohio*, 488 U.S. at 81 n.3 (quoting the no-merit letter in *Anders*) *with* Appendix G (Delgado's *Wende* brief). The Ninth Circuit failed to recognize that a *Wende* brief is a very different type of submission than the *Anders* no-merit letter, a difference that requires testing under the "unreasonable application" prong of § 2254(d).

Even if evaluated under the "contrary to" prong of § 2254(d), the procedure articulated in *Wende* fully complies with this Court's precedents. By summarizing the factual and procedural history of the case, a *Wende* brief "draw[s] attention to 'anything in the record that might arguably support the appeal'" and "serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary presentation." *Penson v. Ohio*, 488 U.S. at 81-82 (n. omitted).

The brief filed by Delgado's attorney on direct appeal demonstrates this point. Counsel discussed the evidence and noted that Delgado agreed to a maximum sentence of fifteen years and received a sentence of fifteen years. App. G. In affirming, the state court of appeal conducted an independent review of the record and read and considered Delgado's supplemental briefing, which argued the same basis for reversal as those later identified by the district court as "legitimate, specific, and compelling." The state court of appeal then concluded there were no arguable issues. App. E. Thus, the *Wende* brief satisfied the goals and principles of *Anders* and *Penson*.

The Ninth Circuit divined from *Anders* an obligation to identify issues and found *Wende*'s omission of such an obligation fatally defective. But the California Supreme Court's conclusion that *Anders* does not obligate counsel to identify issues is not contrary to or an unreasonable application of this Court's opinions, which

dictate record, not issue, references. *Anders v. California*, 386 U.S. at 744 (stating that counsel must file "a brief referring to anything in *the record* that might arguably support the appeal" (italics added)); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. at 430 (describing *Anders* as holding "counsel could not withdraw by simply advising the court of his or her conclusion, but must include with the request to withdraw 'a brief referring to anything in the record that might arguably support the appeal'"); *Penson v. Ohio*, 488 U.S. at 80 (stating that under *Anders* a motion to withdraw must "'be accompanied by a brief referring to anything in the record that might arguably support the appeal'"); *Penson v. Ohio*, 488 U.S. at 82 and n.5 (noting that failure to file a brief "deprived the court of the assistance of an advocate in its own review of the cold record on appeal" and that "[o]ne hurdle faced by an appellate court in reviewing a record on appeal without the assistance of counsel is that the record may not accurately and unambiguously reflect all that occurred at the trial. Presumably, appellate counsel may contact the trial attorney to discuss the case and may thus, in arguing the appeal, shed additional light on the proceedings below. The court, of course, is not in the position to conduct such *ex parte* communications."). As the Supreme Court of Pennsylvania observed,

> The major thrust of *Anders* was to assure a careful assessment of any available claims that an indigent appellant might have. That end is achieved by requiring counsel to conduct an exhaustive examination of the record and by also placing the responsibility on the reviewing court to make an independent determination of the merit of the appeal.

Com. v. McClendon, 495 Pa. 467, 473, 434 A.2d 1185, 1188 (Pa. 1981).

The California Supreme Court is not alone in interpreting *Anders* as not requiring a specification of issues. After noting the obligation to refer to anything in the record that might arguably support an appeal, Oregon's Supreme Court said, "We do not believe that the ethical relationship of Oregon counsel to client or court is furthered at all by compelling counsel to spell out the potentially limitless variety of 'arguably supportive' issues that counsel can fabricate or discern." *State v. Balfour*, 814 P.2d 1069, 1079 (Or. 1991). The court concluded that counsel confronted with a frivolous appeal should file a brief "divided into two sections, Section A and Section B. Section A of the appellant's brief shall contain a statement of the case, including a statement of facts, sufficient to apprise the court of the jurisdictional basis for the appeal. Section A, under those circumstances, *shall contain no assignments of error or argument*." *State v. Balfour*, 311 Or. at 451, 814 P.2d at 1080 (citation omitted, italics added). "Section B . . . shall raise any claim of error requested by the client" but is not signed by the attorney. *Id.* at 452, 814 P.2d at 1080.

The procedure of the Arizona Court of Appeals "does not require appointed counsel to allege arguable issues if counsel determines none exists." *State v. Clark*, ___ Ariz. ___, ___ P.2d ___, 1999 WL 16739, *1 (Ariz. Ct. App. 1999), pet. for rev. pending. The procedures are very similar if not identical to those established in *Wende*, including an opportunity for the defendant to file a brief and independent review of the record. *Id.* at 1999 WL 16739, *8.

In any given case, a creative lawyer could hypothesize and present a wide variety of frivolous issues. It is neither contrary to nor an unreasonable application of *Anders* to conclude that such information is unnecessary to assist the court "in determining both that counsel in fact conduct the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided

without an adversary presentation." *Penson v. Ohio*, 488 U.S. at 81-82. That assistance comes from a brief referring to the record, which, thanks to appellate counsel's efforts, is no longer "'cold'" and is more likely to be accurate. *Penson v. Ohio*, 488 U.S. at 82 and n.5.

This analysis, ignored when offered by Petitioners below, was advanced by the Arizona Court of Appeals in *Clark*. The court expressly disagreed with the Ninth Circuit's analysis in *Robbins*, further aggravating the split of authority. *Clark* explained that

> [b]y requiring counsel to file an *Anders* brief setting forth a detailed factual and procedural history of the case with citations to the record, this court can satisfy itself that counsel has in fact thoroughly reviewed the record. This requirement assures that appointed counsel has diligently provided substantially equal representation to the indigent defendant. In addition, these citations to the record assist the court in determining whether counsel correctly concluded that the appeal is frivolous.

State v. Clark, at 1999 WL 16739, *9.

Because *Wende* approved a briefing procedure that satisfies the twin purposes of *Anders* – assisting the court in determining that counsel has conducted a detailed review of the record and ensuring that the appeal is frivolous – the *Wende* procedure is not contrary to or an unreasonable application of *Anders*. The mere act of filing such a brief, therefore, did not render appellate counsel's performance incompetent, and Delgado is not entitled to habeas relief.

G. The Ninth Circuit Failed To Give Adequate Deference To The State Court's Rejection Of Delgado's Claim When The Court Refused To Require Delgado To Establish Prejudice

Petitioners argued below that even if Delgado's attorney had acted incompetently, prejudice should not automatically be presumed. Delgado's claim of ineffective assistance of appellate counsel fails because Delgado did not establish prejudice as required by *Strickland v. Washington*, 466 U.S. at 687. The Ninth Circuit rejected that argument, concluding the filing of an appellate brief that fails to identify any arguable issues leaves the defendant without counsel on appeal.[6] App. A.

This holding compounds the damage done by the court's invalidation of the *Wende* procedure. Absent a showing of prejudice, habeas petitioners who cannot identify any claim that should have been raised by counsel on direct appeal will be entitled to a second appeal, consuming scarce judicial resources to review yet again cases in which no one -- not the attorney on direct appeal, not the state court of appeal, not the defendant -- can find any trial error.

The Ninth Circuit failed to recognize the differences between this case and *Penson*. In *Penson*, "counsel was permitted to withdraw before the court reviewed the record on nothing more than 'a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief.'" *Id.* at 78. The defendant's request for new counsel was denied. *Id.* at 78. "In due course, and without the assistance of any advocacy for petitioner, the Court of Appeals made its own examination of the record," "noted that counsel's certification that the appeal was meritless was 'highly

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6. As noted above, this Court has granted certiorari on this issue in *Robbins*.

questionable,'" "found 'several arguable claims,'" "concluded that plain error had been committed in the jury instructions concerning one count," reversed on that count

> but affirmed the convictions and sentences on the remaining counts. It concluded that petitioner 'suffered no prejudice' as a result of 'counsel's failure to give a more conscientious examination of the record' because the court had thoroughly examined the record and had received the benefit of arguments advanced by counsel for petitioner's two codefendants.

Penson v. Ohio, 488 U.S. at 79.

This Court rejected the state's argument that any error in granting withdrawal and failing to appoint new counsel was not prejudicial.

> The primary difficulty with the State's argument is that it proves too much. No one disputes that the Ohio Court of Appeals concluded that the record below supported a number of arguable claims. Thus, in finding that petitioner suffered no prejudice, the court was simply asserting that, based on its review of the case, it was ultimately unconvinced that petitioner's conviction—with the exception of one count—should be reversed. Finding harmless error or a lack of *Strickland* prejudice in cases such as this, however, would leave indigent criminal appellants without any of the protections afforded by *Anders*. Under the State's theory, if on reviewing the bare appellate record a court would ultimately conclude that the conviction should not be reversed, then the indigent criminal appellant suffers no prejudice by being denied his right to counsel. Similarly, however, if on reviewing the record the court

> would find a basis for reversal, then the criminal defendant also suffers no prejudice. In either event, the criminal appellant is not harmed and thus has no basis for complaint. Thus, adopting the State's view would render meaningless the protections afforded by *Douglas* and *Anders*.

Penson v. Ohio, 488 U.S. at 86.

Penson involved a *complete denial of counsel* on appeal *when the reviewing court found arguable issues*. *Id.* at 88 ("[I]t is important to emphasize that the denial of counsel in this case left petitioner completely without representation during the appellate court's actual decisional process. This is quite different from a case in which it is claimed that counsel's performance was ineffective."); *Penson v. Ohio*, 488 U.S. at 86. ("The present case is unlike a case in which counsel fails to press a particular argument on appeal, *cf. Jones v. Barnes*, 463 U.S. 745 (1983), or fails to argue an issue as effectively as he or she might. Rather, at the time the Court of Appeals first considered the merits of Petitioner's appeal, appellate counsel had already been granted leave to withdraw; Petitioner was thus entirely without the assistance of counsel on appeal. In fact, the only relief that counsel sought before the Court of Appeals was leave to withdraw, an action that can hardly be deemed advocacy on petitioner's behalf.").

Here, counsel did not withdraw before the court reviewed the record, *and* the court did not find any arguable issues. Essentially, the Ninth Circuit disagreed with the California Court of Appeal and California Supreme Court by finding merit in the issues Delgado raised in his supplemental briefing filed in the California Court of Appeal. Delgado was not "completely without representation during the court's actual decisional process," *Penson v. Ohio*, 488 U.S. at 88, because, unlike the attorney in *Penson*, counsel submitted a *Wende* brief,

not simply a conclusory statement that the appeal had no merit and that he would not file a brief. And because the court found no arguable issues, particularly after reviewing Delgado's supplemental briefing, Delgado, unlike the defendant in *Penson*, had no right to adversary representation. Under the very different circumstances in this case, a habeas petitioner must establish prejudice. *Cf. Ex Parte Dunn*, 514 So. 2d 1300, 1304 and n.3 (Ala. 1987) (concluding that where no brief on appeal is filed, prejudice is presumed but where *Anders* is followed and briefs are filed, a showing of prejudice would generally be required under *Strickland*).

H. The Ninth Circuit's Erroneous Conclusion That A Federal Court's Post-AEDPA Collateral Review Of A State Court Decision Is Not Possible If The State court Failed To Provide Reasons For Its Decision, Thus Requiring An Independent Review, Contributes To The Split Of Authority Among United States Courts Of Appeals On This Important Question Of Federal Law

The Ninth Circuit further erred by concluding a federal court cannot review a state court's application of Supreme Court law if the state court fails to provide an explained decision. Rather, the Ninth Circuit concluded, the federal court must conduct an independent review to ascertain whether the state court decision is contrary to or an unreasonable application of Supreme Court precedent. Based upon this decision, as well as the Ninth Circuit's own definitions and use of the terms "independent review" and "de novo review," independent review is the functional equivalent of de novo review. De novo review of a state court decision is violative of § 2254(d)'s requirement that federal courts accord deference to state court decisions.

The original *Delgado* opinion expressly held if a state court failed to provide any rationale for its decision, the federal court would be required to conduct an independent review of the claims, or, de novo review. The original opinion also asserted it was appropriate for a federal court to give a state court summary denial "less deference" than federal courts normally accorded state court decisions under the AEDPA. For this proposition, the court cited two cases in which the federal court sat as an independent fact-finder. App. B, *Delgado v. Lewis*, 168 F.3d 1148, 1151-53 (1999). The amended Opinion did little more than eliminate the original Opinion's express assertion that de novo review was appropriate when a state court issues a summary denial. The amended Opinion insists in a footnote that an independent review of the record is not synonymous with de novo review. However, the amended Opinion fails to define the difference. App. A. It is difficult to ascertain what that difference could be in light of the fact that the original Opinion used the terms interchangeably, as the Ninth Circuit has consistently done in its own prior opinions. App. B, *Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999), (CA9 1999); *Saridakis v. United Airlines*, 166 F.3d 1272, 1275-76 (9th Cir. 1999); *Public Service Co. of Colorado v. Batt*, 67 F.3d 234, 237 n.3 (9th Cir. 1995); *Jacobsen v. U.S. Postal Service*, 993 F.2d 649, 653-54 (9th Cir. 1992); *In re Marquam Inv. Corp.*, 942 F.2d 1462, 1467 (9th Cir. 1991); *Collazo v. Estelle*, 940 F.2d 411, 415 (9th Cir. 1991); *McQueary v. Blodgett*, 924 F.2d 829, 832 (9th Cir. 1991); *Robinson v. Borg*, 918 F.2d 1387, 1390 (9th Cir. 1990); *Derrick v. Peterson*, 924 F.2d 813, 818 (9th Cir. 1990); *Moss v. C.I.R.*, 831 F.2d 833, 838-39 (9th Cir. 1987); *Chaney v. Lewis*, 801 F.2d 1191, 1194-95 (9th Cir. 1986); *United States v. Givens*, 767 F.2d 574, 580 (1985); *Perry v. O'Donnell*, 749 F.2d 1346, 1348 (1984); *Sorrell v. Securities and Exchange Com'n*, 679 F.2d 1323, 1326 n.2 (1982). The Ninth Circuit's insistence upon independent review

provides a dangerous precedent and invites endless litigation. Furthermore, in this precise context, another United States Court of Appeals' decision concluded independent review is the equivalent of de novo review. *Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 587, 142 L. Ed. 2d 491 (1998).

Independent or de novo review is entirely inconsistent with § 2254(d). Section 2254(d) does not require a state court to establish a pathway of reasons to support a decision. By enacting the AEDPA, Congress exercised its legislative prerogative to limit the authority of the federal courts in granting collateral review of final state court convictions. Congress deliberately chose to restrict the jurisdiction of the federal courts in reviewing state court convictions. In doing so, Congress eliminated federal collateral de novo review. In fact, the "rule of deference" was the "single most important provision contained in the habeas reform proposal bill." 104th Congress, 1st Sess., 141 Cong. Rec. S7841, S7846 (June 7, 1995). There is no reason to think that Congress used "adjudication on the merits" to mean "written explained decisions." In its previous form, § 2254(d) afforded a presumption of correctness to state court factual determinations, but only if "evidenced by a written finding, written opinion, or other reliable and adequate written indicia. . . ." Congress struck these limitations from the statute, which now simply affords a presumption of correctness to "a determination made by a State court. . . . " Thus, Congress forcefully signalled its determination that state court summary adjudication procedures merit full deference.

Numerous federal courts have addressed the § 2254(d) deference standard in the context of a state court summary denial. Some courts have concluded a state court decision requires deference irrespective of whether the decision included any rationale. *Hollman v. Wilson*,

158 F.3d 177, 180 n.3 (3d Cir. 1998); *Parker v. Angelone*, 959 F. Supp. 319, 322-23 (E.D.Va. 1997); *McLee v. Angelone*, 967 F. Supp. 152, 156-57 (E.D.Va. 1997). Some courts have concluded no reasoning is required, but suggested if a state court provides reasoning, the decision is more likely to withstand federal collateral review. *Wright v. Angelone*, 151 F.3d 151, 156-57 (4th Cir. 1998) [the court concluded it would not "presume that a summary order is indicative of a cursory or haphazard review of a petitioner's claims."]; *Weeks v. Angelone*, 4 F. Supp. 2d 497, 522 (E.D.Va. 1998) [still, the key inquiry focuses on the state court decision, not the rationale]; *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997) ["It doesn't follow that the criterion of a reasonable determination is whether it is well reasoned. It is not. It is whether the determination is at least minimally consistent with the facts and circumstances of the case."]. Finally, some courts, including the Ninth Circuit decision in this case, have concluded independent or de novo review is required. *Cardwell v. Greene*, 152 F.3d at 339; *U.S. Ex Rel. Maxwell v. Gilmore*, 37 F. Supp. 2d 1078 (N.D.Ill. 1999).

In *Cardwell*, the court concluded that because the state court decision failed to provide any rationale for its determination, the court was required to conduct an "independent" review of the record. The court also added:

> 'Where . . . there is no indication of how the state court applied federal law to the facts of a case, a federal court must necessarily perform its own review of the record . . . . Thus, on the facts of this case, the distinction between de novo review and "reasonableness" review becomes [in]significant.'

Id. at 339.

The erroneous notion that a federal court should focus on a state court's reasoning originated from language in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), *overruled* on other grounds in 521 U.S. 320 (1997). In *Lindh*, the Seventh Circuit noted a federal court must take into account the "care" with which the state court considered an issue. In stating this, the court was not considering whether a summary denial warranted deference. *Lindh v. Murphy*, 96 F.3d at 871. However, many federal courts subsequently (and improperly) imported this language into the context of whether federal courts must evaluate a state court's reasoning.

Recently, in *Maxwell v. Gilmore*, 37 F. Supp. 2d 1078, the court noted the various cases that have mandated deference to state court summary denials, as well as the cases that have concluded de novo review is required. One case the court relied upon that requires de novo review was the Ninth Circuit's original decision in this case. The court also listed *Cardwell* and *Porter v. Gramley*, 112 F.3d 1308, 1313 (7th Cir. 1997), citing *Lindh*. The court then concluded de novo review was proper, in light of the state court summary denial. *Maxwell v. Gilmore*, 37 F. Supp. 2d at 1088-89. The diversity of positions taken by various United States courts of appeals requires this Court's intervention.

Cardwell spearheaded the alleged validity of de novo review in this context, though this Court has stated, in another context, that when a reviewing court must review a decision without the benefit of any reasoning from the lower court, the reviewing court must "undertake a cumbersome review of the record to determine what facts the . . . [lower court], in the light most favorable to the . . . [prevailing] party, likely assumed." *Johnson v. Jones*, 515 U.S. 304 (1995). While in this case the Ninth Circuit relied upon *Cardwell's* assertion that independent review was required, the panel omitted the next sentence in *Cardwell*, which explained any difference between

"'reasonableness'" review and de novo review was "'insignificant'" in this context. It is difficult to divine that an independent review of the record somehow defines anything but de novo review. If there is any remaining question, the Ninth Circuit's analysis of the underlying facts in the instant case is revealing. The California Court of Appeal and California Supreme Court rejected Delgado's proffered issues. The Ninth Circuit deemed those same issues "legitimate" and "compelling" and went on to provide a summary of the alleged inadequacies of trial counsel. There is no question the Ninth Circuit accorded no deference to the state court implied factual findings. The Ninth Circuit made no mention of viewing the facts in the light most favorable to the state court denials of relief, nor to viewing the facts as the state courts must have found them in order to deny relief.

The varied manner in which federal courts have interpreted § 2254(d) necessitates this Court's intervention in order to implement Congress' intent that federal courts accord deference to state court decisions in post-AEDPA collateral review. This is a pressing and recurring issue of critical importance that demands this Court's attention.

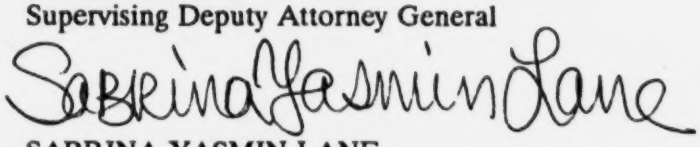
CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: September 9, 1999.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESUS GARCIA DELGADO,
Petitioner-Appellee,

v.

GAIL LEWIS, Deputy Warden; Attorney General of the State of California,
Respondents-Appellants.

No. 97-56162.

Submitted Oct. 5, 1998. [FN1]

Opinion Filed Feb. 23, 1999.
Opinion Withdrawn June 23, 1999.
Filed June 23, 1999.

Sabrina Y. Lane, Deputy Attorney General, San Diego, California, for the respondents-appellants.

Michael B. Dashjian, Solvang, California, for the petitioner-appellee.

Appeal from the United States District Court for the Central District of California. Manuel L. Real, District Judge, Presiding. D.C. No. CV-96-07241-R.

Before: Harry Pregerson, Dorothy W. Nelson, and Sidney R. Thomas, Circuit Judges.

ORDER

THOMAS, Circuit Judge:

*1 The opinion filed on February 23, 1999, and reported at 168 F.3d 1148 (9th Cir.1999), is withdrawn, and the attached opinion is filed in its place.

With the amendments to the opinion, the petition for rehearing is denied. The full court has been advised of the suggestion for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the matter en banc. Thus, the suggestion for rehearing en banc is rejected.

OPINION

Jesus Garcia Delgado claims his appellate counsel ineffectively assisted him by failing to raise any arguable issues in his appellate brief. The district court agreed and granted his petition for a writ of habeas corpus. We affirm.

I

Delgado is a forty-five-year old man of Hispanic descent who speaks and understands very little English. In 1994, he was arrested along with five codefendants and charged with manufacturing methamphetamine, possession of ephedrine with intent to manufacture methamphetamine, and possession of methamphetamine for sale. The felony complaint also sought sentence enhancements.

Delgado initially rejected a plea agreement and entered a plea of not guilty, but subsequently pled guilty to the three counts and the two sentence enhancements. As part of a global joint plea agreement, the state sentencing judge agreed not to sentence any of the defendants to more than fifteen years and agreed to consider mitigating factors at the sentencing hearing.

Delgado's appointed trial counsel did not attend the preliminary hearing, the sentencing hearing, or Delgado's signing of the change-of-plea agreement. In fact, an attorney for a codefendant explained the change-of-plea agreement and form to Delgado. Delgado's trial counsel did accompany his client to the change-of-plea hearing, but had to admit to the district court that he had not explained the change-of-plea form to Delgado and instead that he had relied on a codefendant's attorney to do so. The court asked the other attorney, who was present representing his own client, if he had explained the change-of-plea form to Delgado. The codefendant's attorney stated that the interpreter told him that Delgado had some questions, but that he had answered them and Delgado "appeared" to understand the explanation.

When the court asked Delgado how he pled to the first charge, he replied, "I have always said I was innocent. Oh, okay, guilty." He answered guilty to the other two charges and admitted the sentence enhancements.

Delgado's appointed counsel also failed to appear at the sentencing hearing. In his absence, an attorney for yet another codefendant indicated she would temporarily represent Delgado, whom she said had agreed to the arrangement. The sentencing hearing commenced, with the attorneys for all of the other defendants making arguments on behalf of their clients. Delgado's "substitute" counsel separately represented another codefendant at the

hearing and, after extensive argument, obtained a favorable agreement resulting in probation for her client. When the court turned to Delgado's sentence, however, the substitute counsel simply said, "I'm just going to submit it on basically the Court's judgment as to exactly how much time Mr. Delgado should get." Delgado was never asked if he wished to make a statement on his own behalf, and the record is unclear about whether Delgado had the assistance of an interpreter. Finally, the judge noted that he had reviewed the probation office's report but had not "received any other documentation in connection with this case." He then sentenced Delgado to fifteen years-the maximum under the plea agreement-notwithstanding the fact that Delgado had no known criminal record.

*2 Although making only a cameo appearance on behalf of his client before the imposition of sentence, Delgado's appointed counsel did manage to file a request for a certificate of probable cause, which stated that Delgado wanted to appeal his plea because: (1) "the translation to Spanish as well as the advice by the attorney regarding plea negotiations and actual entry of plea were inadequate," and (2) he had wanted to "withdraw his plea prior to sentencing but confusion in translation and attorney communication prevented this from being raised."

New counsel was appointed to argue the appeal for Delgado. In discharge of his duties, appellate counsel filed a brief that did not raise any issues or ask for reversal on any ground, not even those grounds identified by trial counsel in his request for a certificate of probable cause. Instead, the brief merely recited the allegations of the charging documents and invited the California Court of Appeals to conduct an independent review of the record.

Although his appointed appellate counsel had not withdrawn, Delgado filed his own supplemental brief alleging ineffective assistance of trial counsel under both the state and federal constitutions. He alleged that his trial counsel had been ineffective in advising him to enter a guilty plea, that his counsel had not consulted with him because of the difficulty in communicating through an interpreter, and that he had entered a guilty plea due to a mistaken belief that his sentence would be time served. Finally, he argued that his appointed counsel was absent from the sentencing hearing and that no attorney had argued on his behalf regarding mitigation.

The Court of Appeals for the Fourth District of California affirmed the conviction without opinion, stating only that it had conducted an independent review of the record and found no arguable issues. Delgado then filed a pro. per. petition in the Supreme Court of California, which was denied without opinion. Next, Delgado filed a petition for a state writ of habeas corpus in the Supreme Court of California, alleging ineffective assistance of trial and appellate counsel under both the state and federal constitutions on the same grounds he had raised in his pro. per. direct appeal. Delgado also asserted that his appellate counsel had been ineffective because he had failed to raise trial counsel's ineffectiveness in the appellate brief and failed to send him copies of the trial transcripts as required by California law. Finally, Delgado alleged that he misunderstood, due to his inability to speak or understand English, that his plea would subject him to a fifteen-year sentence. The Supreme Court of California denied his state habeas petition in a one sentence order.

On October 15, 1996, Delgado filed a petition for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254, alleging ineffective assistance of

appellate counsel. The district court granted Delgado's petition, stating that unless the California Court of Appeals reinstated Delgado's direct appeal and provided him with new counsel within sixty days, he would be released from prison. Deputy Warden Lewis filed a timely notice of appeal with this court, but did not seek a stay of the district court's Order. Accordingly, the California Court of Appeals vacated its prior opinion, reinstated Delgado's direct appeal, appointed new counsel pursuant to the Order, but stayed the state proceedings pending the outcome of this appeal.

II

*3 Delgado properly exhausted the remedies available to him in state court, as required by 28 U.S.C. § 2254(b)(1), by filing a state writ of habeas corpus in the Supreme Court of California alleging ineffective assistance of trial and appellate counsel under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). His allegations in the state court petition of ineffective assistance in violation of both the California and United States Constitutions were sufficient to "fairly present" the claim to the state court. See Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). Although Delgado's petition did not specifically argue that the brief filed by his appellate counsel violated Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), his petition was sufficient to alert the State to both state and federal precedent governing his claim of ineffective assistance of counsel, including Anders.

III

Because Delgado filed his federal habeas petition after April 1, 1996, the Anti-Terrorism and Effective

Death Penalty Act ("AEDPA") applies to his petition. See Lindh v. Murphy, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir.) (en banc), cert. denied, --- U.S. ----, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997). Under AEDPA, a federal court may grant habeas relief if a state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (West Supp.1998).

As recently noted by a panel of our court, AEDPA's standard of review provisions "reflect the ... general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court." Davis v. Kramer, 167 F.3d 494, 500 (9th Cir.1999). Under Davis:

> [A] state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.

Id.

Davis provides a framework for analyzing state court opinions under AEDPA. Unfortunately, when a state court does not articulate the rationale for its determination, a review of that court's "application" of

clearly established federal law is not possible. [FN2] See Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir.), cert. denied, --- U.S. ----, 119 S.Ct. 587, 142 L.Ed.2d 491 (1998). Thus, when confronted with a state court decision that does not provide the basis of its decision, we must determine whether, in light of an independent review of the record and the relevant federal law, the state court's resolution of a petitioner's claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." [FN3] 28 U.S.C.A. § 2254(d)(1).

IV

A

*4 After conducting an independent review of the record and the relevant federal law, we conclude that the California state court's resolution of this case was contrary to clearly established Federal law, as determined by the Supreme Court of the United States. The district court correctly concluded that Delgado had been denied his Sixth Amendment right to effective assistance of appellate counsel under Strickland v. Washington, which is "clearly established" law for the purposes of AEDPA. See Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir.1997). The district court properly determined that Delgado's appellate counsel was ineffective because he failed to raise any arguable issues in the appellate brief in violation of the procedure announced in Anders v. California.

Under clearly established federal law as determined by the Supreme Court, all criminal defendants have a right to an advocate in mandatory appeals. See Douglas v. California, 372 U.S. 353, 355-58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Appellate counsel has an ethical responsibility

of constitutional dimension to argue zealously those issues that counsel finds not wholly frivolous. See Anders, 386 U.S. at 744. When an attorney believes an appeal would violate his or her ethical duty to refrain from making frivolous arguments, Anders requires counsel to "advise the court and request permission to withdraw." Id. A request to withdraw, "must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." Id. The attorney must send the brief to the defendant and the defendant must be informed of his or her right to file a supplemental brief. See id.

The reviewing court then must make a full examination of all of the proceedings to determine if the appeal is in fact wholly frivolous. See id. If the court finds the appeal to be frivolous, the court may permit counsel to withdraw. See id. If the court finds any arguable issues, it must appoint counsel for the defendant. See id. The reason for this exacting procedure is to ensure that indigent defendants receive the same legal assistance that nonindigent defendants receive. See id. at 745. In addition, the brief containing "ready references" to arguable issues assists the court in its vigorous review, rather than presenting the court with a cold record. See id.

These mandates were violated in this case. The appellate brief filed on Delgado's behalf "failed to draw attention to 'anything in the record that might arguably support the appeal' "-a failure that left Delgado constructively without counsel on appeal. Penson v. Ohio, 488 U.S. 75, 81, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) (quoting Anders, 386 U.S. at 744). In addition, counsel did not file a motion to withdraw as required by Anders. See 386 U.S. at 744. Thus, Delgado's appellate counsel rendered constitutionally deficient representation within the meaning of Strickland. See Davis, 167 F.3d at 497-98

(applying AEDPA to an identical challenge under Strickland and Anders and determining that the Supreme Court in Anders clearly established that appellate counsel must raise arguable issues in an Anders brief).

*5 Contrary to the Deputy Warden's contention, AEDPA does not preclude the district court's application of Anders to invalidate California's no-merit brief procedure approved in People v. Wende, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (Cal.1979). In Davis, we examined the interplay between Anders and the California no-merit brief procedure approved in Wende, and concluded that the Wende procedure did not comport with the constitutional requirements of Anders. See 167 F.3d at 498; see also Robbins v. Smith, 152 F.3d 1062, 1068 (9th Cir.1998) (holding that, for retroactivity purposes in a case in which appellate counsel had filed a Wende brief, "[a]pplication of Anders ... required no extension of precedent or logical interpolation. The facts of Robbins's case almost directly mirror those of Anders. Accordingly, no 'new' constitutional rule was invoked in this case"), cert. granted, --- U.S. ----, 119 S.Ct. 1139, 143 L.Ed.2d 207 (1999). Likewise, in this case we have applied existing Supreme Court precedent to reach our decision, a methodology consistent with AEDPA.

Further, AEDPA does not "compel" federal courts to turn an amaurotic eye to state court proceedings, nor to rubberstamp unexplained state court decisions without regard to whether they are contrary to clearly established Federal law as determined by the Supreme Court. Indeed, true cooperative federalism demands a more nuanced approach. In this case, the results hardly could be more plain. Anders has been clearly established law of the United States Supreme Court for more than thirty years. As Chief Judge Hug determined, Wende procedures do not comport with the "very low threshold" established by

the Supreme Court in Anders. See Robbins, 152 F.3d at 1067-68. And as the Davis court held, nothing in AEDPA alters that assessment. See 167 F.3d at 498.

On the face of this record, Delgado's appellate counsel failed to satisfy Anders by first refusing to identify any appellate issues, despite the prior listing of potential issues by trial counsel, and by then neglecting to seek to withdraw as counsel. These errors rendered appellate counsel's performance constitutionally deficient under the Sixth Amendment. See Strickland, 466 U.S. at 687-91; Davis, 167 F.3d at 498.

B

*6 The district court properly held that under Strickland, Delgado did not need to show prejudice because the failure of his counsel to raise arguable issues in the appellate brief creates a presumption of prejudice. See Penson, 488 U.S. at 86; Davis, 167 F.3d at 499. As the Supreme Court explained in Penson, when appellate counsel's only action is to file a motion to withdraw that raises no arguably appealable issues, a petitioner is "completely without representation during the appellate court's actual decisional process." 488 U.S. at 88. Merely filing a no-merit brief similarly leaves a petitioner without representation on appeal. This situation differs radically from the case "in which counsel fails to press a particular argument." Id. Thus, when counsel fails to raise any arguable issues in the appellate brief, it is "inappropriate to apply either the prejudice requirement of Strickland or the harmless error analysis of Chapman." Id. at 88-89; see also Lofton v. Whitley, 905 F.2d 885, 887-88 (5th Cir.1990) (presuming prejudice when counsel failed both to raise arguable issues in the appellate brief and ask for leave to withdraw).

The wisdom of this rule is amply demonstrated in this case. Throughout his journey in the criminal justice system, Delgado had hardly any assistance, much less effective assistance, of appointed counsel. His appointed trial counsel, who purportedly met with Delgado on only three occasions, was absent from almost all of the court proceedings. Instead, Delgado received his advice and representation from attorneys for his codefendants who, although no doubt well- meaning, had other priorities and inherent conflicts of interest in this multi- defendant drug conspiracy case-a case in which even the judge noted the "finger-pointing" among codefendants. No one submitted any evidence or even argument for mitigation of his sentence, although factors that might have supported a reduction existed.

Although trial counsel's ineffective assistance pre-sented a legitimate, specific, and compelling appellate issue, it was never developed or presented by counsel. Even after specific appellate issues were identified in the certificate for probable cause, Delgado's appointed appellate counsel ignored them, simply choosing to inform the court that there were no arguable issues. When appellate counsel deliberately elected to ignore the requirements of Anders, he completely deprived Delgado of the right to counsel on appeal. Thus, the district court appropriately held that Delgado's Sixth Amendment rights had been violated.

C

The legal assistance provided in this case did not comport with the representation of indigent defendants contemplated by the Supreme Court in Anders, Penson, Strickland, and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). To hold otherwise would, to paraphrase Eliot, render the clear sound of Gideon 's

trumpet quiet and meaningless as wind in dry grass. We affirm the judgment of the district court.

*7 AFFIRMED.

FN1. The panel finds this case appropriate for submission without oral argument pursuant to Federal Rule of Appellate Procedure 34(a).

FN2. We note that in Davis v. Kramer, the California Court of Appeals supplied a decision, albeit unpublished, explaining why it was denying Davis's appeal. See 167 F.3d at 496. In this case, the California Court of Appeals affirmed Delgado's conviction without opinion. The court made no factual findings nor drew any conclusions of law. The Supreme Court of California summarily denied review. Six months later, the Supreme Court of California denied Delgado's petition for habeas relief, again without explanation. Thus, Davis presented different factual circumstances than are present here.

FN3. Conducting an independent review of the record and applicable federal law when the state has not articulated its reasoning is not the equivalent of applying a de novo standard of review to state court decisions under these circumstances; rather, it provides the method for ascertaining whether the state court's resolution of the case was "contrary to, or involved an unreasonable application of, clearly established Federal law" under AEDPA. 28 U.S.C.A. § 2254(d)(1). This approach is in consonance with the deference we have accorded state court findings of fact on habeas review. Although AEDPA ordinarily requires federal courts to defer

to state court factual findings, we have, in a number of cases in which the state court did not make findings of fact, granted less deference to the state court decision. See Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir.1997) (holding that when a state court has made no findings of fact, "the district court's duty to ascertain the sufficiency of the evidence by engaging in a thorough review of the complete state court record is unaffected by the AEDPA"); Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir.1996) (stating that the district court's evidentiary hearing was the first chance that the petitioner had to develop the factual basis of his claim and therefore finding that it would be inappropriate to disregard the facts developed in the district court even in the light of AEDPA), cert. denied, 520 U.S. 1151, 117 S.Ct. 1329, 137 L.Ed.2d 489 (1997).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESUS GARCIA DELGADO,
Petitioner-Appellee,

v.

GAIL LEWIS, Deputy Warden; Attorney General of the State of California,
Respondents-Appellants.

No. 97-56162.

Submitted Oct. 5, 1998. [FN1]

FN1. The panel finds this case appropriate for submission without oral argument pursuant to Federal Rule of Appellate Procedure 34(a).

Decided Feb. 23, 1999.

Petitioner who pleaded guilty in state court to manufacturing methamphetamine, possession of ephedrine with intent to manufacture methamphetamine, and possession of methamphetamine for sale petitioned for federal habeas corpus relief. The United States District Court for the Central District of California, Manuel L. Real, J., granted petition. State appealed. The Court of Appeals, Thomas, Circuit Judge, held that: (1) petitioner exhausted state remedies; (2) district court was required to apply de novo review to petitioner's claims; (3) petitioner's state appellate counsel rendered

constitutionally deficient representation; and (4) appellate counsel's deficient performance created presumption of prejudice.

Affirmed.

*1149 Sabrina Y. Lane, Deputy Attorney General, San Diego, California, for respondents-appellants.

Michael B. Dashjian, Solvang, California, for petitioner-appellee.

Appeal from the United States District Court for the Central District of California; Manuel L. Real, District Judge, Presiding. D.C. No. CV-96-07241- R.

Before: PREGERSON, DOROTHY W. NELSON, and THOMAS, Circuit Judges.

THOMAS, Circuit Judge:

Jesus Garcia Delgado claims his appellate counsel ineffectively assisted him by failing to raise any arguable issues in his appellate brief. The district court agreed and granted his petition for a writ of habeas corpus. We affirm.

I

Delgado is a forty-five-year old man of Hispanic descent who speaks and understands very little English. In 1994, he was arrested along with five codefendants and *1150 charged with manufacturing methamphetamine, possession of ephedrine with intent to manufacture methamphetamine, and possession of methamphetamine for sale. The felony complaint also sought sentence enhancements.

Delgado initially rejected a plea agreement and entered a plea of not guilty, but subsequently pled guilty to the three counts and the two sentence enhancements. As part of a global joint plea agreement, the state sentencing judge agreed not to sentence any of the defendants to more than fifteen years and agreed to consider mitigating factors at the sentencing hearing.

Delgado's appointed trial counsel did not attend the preliminary hearing, the sentencing hearing, or Delgado's signing of the change-of-plea agreement. In fact, an attorney for a codefendant explained the change-of-plea agreement and form to Delgado. Delgado's trial counsel did accompany his client to the change-of-plea hearing, but had to admit to the district court that he had not explained the change-of-plea form to Delgado and instead that he had relied on a codefendant's attorney to do so. The court asked the other attorney, who was present representing his own client, if he had explained the change-of-plea form to Delgado. The codefendant's attorney stated that the interpreter told him that Delgado had some questions, but that he had answered them and Delgado "appeared" to understand the explanation.

When the court asked Delgado how he pled to the first charge, he replied, "I have always said I was innocent. Oh, okay, guilty." He answered guilty to the other two charges and admitted the sentence enhancements.

Delgado's appointed counsel also failed to appear at the sentencing hearing. In his absence, an attorney for yet another codefendant indicated she would temporarily represent Delgado, whom she said had agreed to the arrangement. The sentencing hearing commenced, with the attorneys for all of the other defendants making arguments on behalf of their clients. Delgado's

"substitute" counsel separately represented another codefendant at the hearing and, after extensive argument, obtained a favorable agreement resulting in probation for her client. When the court turned to Delgado's sentence, however, the substitute counsel simply said, "I'm just going to submit it on basically the Court's judgment as to exactly how much time Mr. Delgado should get." Delgado was never asked if he wished to make a statement on his own behalf, and the record is unclear about whether Delgado had the assistance of an interpreter. Finally, the judge noted that he had reviewed the probation office's report but had not "received any other documentation in connection with this case." He then sentenced Delgado to fifteen years--the maximum under the plea agreement--notwithstanding the fact that Delgado had no known criminal record.

Although making only a cameo appearance on behalf of his client before the imposition of sentence, Delgado's appointed counsel did manage to file a request for a certificate of probable cause, which stated that Delgado wanted to appeal his plea because: (1) "the translation to Spanish as well as the advice by the attorney regarding plea negotiations and actual entry of plea were inadequate," and (2) he had wanted to "withdraw his plea prior to sentencing but confusion in translation and attorney communication prevented this from being raised."

New counsel was appointed to argue the appeal for Delgado. In discharge of his duties, appellate counsel filed a brief that did not raise any issues or ask for reversal on any ground, not even those grounds identified by trial counsel in his request for a certificate of probable cause. Instead, the brief merely recited the allegations of the charging documents and invited the California Court of Appeals to conduct an independent review of the record.

Although his appointed appellate counsel had not withdrawn, Delgado filed his own supplemental brief alleging ineffective assistance of trial counsel under both the state and federal constitutions. He alleged that his trial counsel had been ineffective in advising him to enter a guilty plea, that his counsel had not consulted with him because of the difficulty in communicating through an interpreter, and that he had entered a guilty plea *1151 due to a mistaken belief that his sentence would be time served. Finally, he argued that his appointed counsel was absent from the sentencing hearing and that no attorney had argued on his behalf regarding mitigation.

The Court of Appeals for the Fourth District of California affirmed the conviction without opinion, stating only that it had conducted an independent review of the record and found no arguable issues. Delgado then filed a pro. per. petition in the Supreme Court of California, which was denied without opinion. Next, Delgado filed a petition for a state writ of habeas corpus in the Supreme Court of California, alleging ineffective assistance of trial and appellate counsel under both the state and federal constitutions on the same grounds he had raised in his pro. per. direct appeal. Delgado also asserted that his appellate counsel had been ineffective because he had failed to raise trial counsel's ineffectiveness in the appellate brief and failed to send him copies of the trial transcripts as required by California law. Finally, Delgado alleged that he misunderstood, due to his inability to speak or understand English, that his plea would subject him to a fifteen-year sentence. The Supreme Court of California denied his state habeas petition in a one sentence order.

On October 15, 1996, Delgado filed a petition for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254, alleging ineffective assistance of

appellate counsel. The district court granted Delgado's petition, stating that unless the California Court of Appeals reinstated Delgado's direct appeal and provided him with new counsel within sixty days, he would be released from prison. Deputy Warden Lewis filed a timely notice of appeal with this court, but did not seek a stay of the district court's Order. Accordingly, the California Court of Appeals vacated its prior opinion, reinstated Delgado's direct appeal, appointed new counsel pursuant to the Order, but stayed the state proceedings pending the outcome of this appeal.

II

[1] Delgado properly exhausted the remedies available to him in state court, as required by 28 U.S.C. § 2254(b)(1), by filing a state writ of habeas corpus in the Supreme Court of California alleging ineffective assistance of trial and appellate counsel under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). His allegations in the state court petition of ineffective assistance in violation of both the California and United States Constitutions were sufficient to "fairly present" the claim to the state court. See Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). Although Delgado's petition did not specifically argue that the brief filed by his appellate counsel violated Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), his petition was sufficient to alert the State to both state and federal precedent governing his claim of ineffective assistance of counsel, including Anders.

III

[2] Because Delgado filed his federal habeas petition after April 1, 1996, the Anti-Terrorism and

Effective Death Penalty Act ("AEDPA") applies to his petition. See Lindh v. Murphy, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir.) (en banc), cert. denied, --- U.S. ----, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997). Under AEDPA, a federal court may grant habeas relief if a state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C.A. § 2254(d) (West Supp.1998).

Consistent with the approach taken by other circuits, the district court concluded that because the state court had not articulated the reasoning for its decision when it denied Delgado's habeas petition, de novo review was necessary. See Herbert v. Billy, 160 F.3d 1131, 1135 (6th Cir.1998) (stating that *1152 part of reasonableness review under AEDPA "requires federal courts to take into account the care with which the state court considered the subject"); Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir.), cert. denied, --- U.S. ----, 119 S.Ct. 587, 142 L.Ed.2d 491 (1998) (holding that it could not review a state court's application of "clearly established law" when the court does not give a rationale for its adverse determination; in such a case the federal court must "independently ascertain whether the record reveals a violation"); Porter v. Gramley, 112 F.3d 1308, 1313 (7th Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 886, 139 L.Ed.2d 873 (1998)

(holding that AEDPA mandates respect for state court judgments if they contain a "responsible, thoughtful answer reached after a full opportunity to litigate") (citations omitted). We agree.

[3] A more deferential standard of review of a state court's application of "clearly established law" may be warranted when the state court has provided a "thoughtfully reasoned decision." Lindh v. Murphy, 96 F.3d 856, 871 (7th Cir.1996), rev'd on other grounds, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). And, as recently noted by a panel of our court, AEDPA's standard of review provisions "reflect the ... general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court." Davis v. Kramer, 167 F.3d 494, 500 (9th Cir.1999). The Davis court went on to explore and define the meaning of "clearly established law" and "unreasonable applications of law" in a careful analysis that comports with other federal courts of appeals decisions. See id. at 500. That issue, however, is not before us because when a state court does not articulate the rationale for its determination, a review of that court's "application of clearly established Federal law" is not possible. See Cardwell, 152 F.3d at 339. Thus, when confronted with a state court decision totally devoid of reasoning, a federal district court independently must determine whether the record reveals a constitutional violation. See id. Under those circumstances, de novo review is appropriate. [FN2]

> FN2. We note that in Davis v. Kramer, the California Court of Appeals supplied a decision, albeit unpublished, explaining why it was denying Davis's appeal. See 167 F.3d at 496. Thus, Davis presented different factual circumstances than are present here.

This approach is in consonance with the deference we have accorded state court findings of fact on habeas review. Although AEDPA requires federal courts to defer to reasonable state court factual findings, we have, in a number of cases in which the state court did not make findings of fact, granted less deference to the state court decision. See Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir.1997) (holding that when a state court has made no findings of fact, "the district court's duty to ascertain the sufficiency of the evidence by engaging in a thorough review of the complete state court record is unaffected by the AEDPA"); Jeffries, 114 F.3d at 1500 (stating that when reviewing a state court's factual determinations, a "responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment") (citations and internal quotation marks omitted); Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir.1996) (stating that the district court's evidentiary hearing was the first chance that the petitioner had to develop the factual basis of his claim and therefore finding that it would be inappropriate to disregard the facts developed in the district court even in the light of AEDPA), cert. denied, 520 U.S. 1151, 117 S.Ct. 1329, 137 L.Ed.2d 489 (1997).

In this case, the California Court of Appeals affirmed Delgado's conviction without opinion. The court made no factual findings nor drew any conclusions of law. The Supreme Court of California summarily denied review. Six months later, the Supreme Court of California denied Delgado's petition for habeas relief, again without explanation. Such a perfunctory review, often euphemistically described as a "postcard denial," does not warrant the deference we might usually apply. Absent a reasoned explanation, federal courts are left simply to speculate about what "clearly established law" the state court might have applied, as well as how it was applied.

Under these circumstances, *1153 meaningful consideration of the state court's reasoning on federal habeas review is not possible. Thus, the district court properly deduced that it was left with no alternative but to review independently the claims in the petition.

IV

A

[4][5] After conducting an independent analysis, the district court correctly concluded that Delgado had been denied his Sixth Amendment right to effective assistance of appellate counsel under Strickland v. Washington, which is "clearly established law" for the purposes of AEDPA. See Jones, 114 F.3d at 1013. The district court properly determined that Delgado's appellate counsel was ineffective because he failed to raise any arguable issues in the appellate brief in violation of the procedure announced in Anders v. California.

[6][7] Under clearly established law, all criminal defendants have a right to an advocate in mandatory appeals. See Douglas v. California, 372 U.S. 353, 355-58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Appellate counsel has an ethical responsibility of constitutional dimension to argue zealously those issues that counsel finds not wholly frivolous. See Anders, 386 U.S. at 744, 87 S.Ct. 1396. When an attorney believes an appeal would violate his or her ethical duty to refrain from making frivolous arguments, Anders requires counsel to "advise the court and request permission to withdraw." Id. A request to withdraw, "must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." Id. The attorney must send the brief to the defendant and the defendant must be informed of his or her right to file a supplemental brief. See id.

[8] The reviewing court then must make a full examination of all of the proceedings to determine if the appeal is in fact wholly frivolous. See id. If the court finds the appeal to be frivolous, the court may permit counsel to withdraw. See id. If the court finds any arguable issues, it must appoint counsel for the defendant. See id. The reason for this exacting procedure is to ensure that indigent defendants receive the same legal assistance that nonindigent defendants receive. See id. at 745. In addition, the brief containing "ready references" to arguable issues assists the court in its vigorous review, rather than presenting the court with a cold record. See id.

These mandates were violated in this case. The appellate brief filed on Delgado's behalf "failed to draw attention to 'anything in the record that might arguably support the appeal' "--a failure that left Delgado constructively without counsel on appeal. Penson v. Ohio, 488 U.S. 75, 81, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) (quoting Anders, 386 U.S. at 744, 87 S.Ct. 1396). In addition, counsel did not file a motion to withdraw as required by Anders. See 386 U.S. at 744, 87 S.Ct. 1396. Thus, Delgado's appellate counsel rendered constitutionally deficient representation within the meaning of Strickland. See Davis, 167 F.3d at 496-98 (applying AEDPA to an identical challenge under Strickland and Anders and determining that the Supreme Court in Anders clearly established that appellate counsel must raise arguable issues in an Anders brief).

[9] Contrary to the Deputy Warden's contention, AEDPA does not preclude the district court's application of Anders to invalidate California's no-merit brief procedure approved in People v. Wende, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (1979). In Davis, we examined the interplay between Anders and the California

no-merit brief procedure approved in Wende, and concluded that the Wende procedure did not comport with the constitutional requirements of Anders. See 167 F.3d at 498-99; see also Robbins v. Smith, 152 F.3d 1062, 1068 (9th Cir.1997) (holding that, for retroactivity purposes in a case in which appellate counsel had filed a Wende brief, "[a]pplication of Anders ... required no extension of precedent or logical interpolation. The facts of Robbins's case almost directly mirror those of Anders. Accordingly, no 'new' constitutional rule was invoked in this case"), petition for cert. filed, 67 U.S.L.W. 3437 (U.S. Dec. 17, 1998) (No. 98-1037). Likewise, in this case we have *1154 applied existing Supreme Court precedent to reach our decision, a methodology consistent with AEDPA.

Further, AEDPA does not "compel" federal courts to turn an amaurotic eye to state court proceedings, nor to rubberstamp state court interpretation of federal law. Indeed, true cooperative federalism, as well as AEDPA, demands a more nuanced approach. In this case, the results hardly could be more plain. Anders has been clearly established law of the United States Supreme Court for more than thirty years. As Chief Judge Hug determined, Wende procedures do not comport with the "very low threshold" established by the Supreme Court in Anders. See Robbins, 152 F.3d at 1067-68. And as the Davis court held, nothing in AEDPA alters that assessment. See 167 F.3d at 498.

On the face of this record, Delgado's appellate counsel failed to satisfy Anders by first refusing to identify any appellate issues, despite the prior listing of potential issues by trial counsel, and by then neglecting to seek to withdraw as counsel. These errors rendered appellate counsel's performance constitutionally deficient under the

Sixth Amendment. See Strickland, 466 U.S. at 687-91, 104 S.Ct. 2052; Davis, 167 F.3d at 498.

B

[10] The district court properly held that under Strickland, Delgado did not need to show prejudice because the failure of his counsel to raise arguable issues in the appellate brief creates a presumption of prejudice. See Penson, 488 U.S. at 86, 109 S.Ct. 346; Davis, 167 F.3d at 499-500. As the Supreme Court explained in Penson, when appellate counsel's only action is to file a motion to withdraw that raises no arguably appealable issues, a petitioner is "completely without representation during the appellate court's actual decisional process." 488 U.S. at 88, 109 S.Ct. 346. Merely filing a no-merit brief similarly leaves a petitioner without representation on appeal. This situation differs radically from the case "in which counsel fails to press a particular argument." Id. Thus, when counsel fails to raise any arguable issues in the appellate brief, it is "inappropriate to apply either the prejudice requirement of Strickland or the harmless error analysis of Chapman[v. State of Cal., 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)]." Id. at 88-89, 109 S.Ct. 346; see also Lofton v. Whitley, 905 F.2d 885, 887-88 (5th Cir.1990) (presuming prejudice when counsel failed both to raise arguable issues in the appellate brief and ask for leave to withdraw).

The wisdom of this rule is amply demonstrated in this case. Throughout his journey in the criminal justice system, Delgado had hardly any assistance, much less effective assistance, of appointed counsel. His appointed trial counsel, who purportedly met with Delgado on only three occasions, was absent from almost all of the court proceedings. Instead, Delgado received his advice and representation from attorneys for his codefendants who,

although no doubt well- meaning, had other priorities and inherent conflicts of interest in this multi- defendant drug conspiracy case-a case in which even the judge noted the "finger-pointing" among codefendants. No one submitted any evidence or even argument for mitigation of his sentence, although factors that might have supported a reduction existed.

Although trial counsel's ineffective assistance presented a legitimate, specific, and compelling appellate issue, it was never developed or presented by counsel. Even after specific appellate issues were identified in the certificate for probable cause, Delgado's appointed appellate counsel ignored them, simply choosing to inform the court that there were no arguable issues. When appellate counsel deliberately elected to ignore the requirements of Anders, he completely deprived Delgado of the right to counsel on appeal. Thus, the district court appropriately held that Delgado's Sixth Amendment rights had been violated.

C

The absence of any meaningful legal assistance in this case makes a mockery of the representation of indigent defendants contemplated by the Supreme Court in Anders, Penson, Strickland, and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Clearly established constitutional *1155 law requires competent advocacy in criminal defense, not shadowboxing. To hold otherwise would, to paraphrase Eliot, render the clear sound of Gideon 's trumpet quiet and meaningless as wind in dry grass.

We affirm the judgment of the district court.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS GARCIA DELGADO,

Petitioner,

v.

GAIL LEWIS, WARDEN, et al.,

Respondents.

Case No.: CV 96-7241-R (RNB)

JUDGMENT

Pursuant to the Order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate Judge,

The Petition for Writ of Habeas Corpus is conditionally granted. Respondents shall discharge Petitioner from custody on the subject conviction unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal and provides petitioner with new appointed counsel within sixty (60) days of the entry of Judgment herein.

DATED: June 30, 1997

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS GARCIA DELGADO,
Petitioner

v.

GAIL LEWIS, WARDEN, et al.,
Respondents.

Case No.: CV 96-7241-R (RNB)

ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the pleadings and papers herein, including the Final Report and Recommendation and the Report and Recommendation of United States Magistrate Judge. Objections to the Report and Recommendation have been filed herein. Having made a de novo determination of those portions of the Report and Recommendation to which objection has been made, the Court concurs with and adopts the findings and conclusions of the Magistrate Judge.

IT IS ORDERED that a conditional writ of habeas corpus be granted to the extent that petitioner shall be discharged from custody on the subject conviction unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal and provides petitioner with new

appointed counsel within 60 days of the entry of Judgment herein.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Final Report and Recommendation and the Judgment by United States mail on Petitioner and counsel for Respondents.

DATED: June 30, 1997

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS GARCIA DELGADO,
Petitioner

v.

GAIL LEWIS, WARDEN, et al.,
Respondents.

Case No.: CV 96-7241-R (RNB)

FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Final Report and Recommendation is submitted to the Honorable Manuel L. Real, United States District Judge, pursuant to the provisions of 28 U.S.C. ~ 636 and General Order 194 of the United States Distr'ict Court for the Central District of California.

On May 28, 1997, the Clerk filed Notice of Filing of Magistrate Judge's Report and Recommendation and Lodging of Proposed Judgment, which was served on the parties together with copies of said Report and Recommendation ("R&R"). Respondents have timely filed objections to the Report and Recommendation.

Having carefully read and considered respondents' objections, the Court finds no good reason set forth for changing or modifying the recommendation in any respect.

The Court will set forth and address each of the objections in turn.

I: "This Court should not address whether Wende comports with Anders, because petitioner has not exhausted this claim."

In this section of their objections, respondents merely have repackaged and restated arguments already made by them in their Supplemental Answer. (Compare Objections at 6-8 with Supplemental Answer at 5-6). The Court already has considered, addressed and rejected these arguments. As noted in the Report and Recommendation, in his California Supreme Court habeas petition, petitioner claimed that both his counsel (i.e., his counsel at the trial level and his counsel on appeal) had violated his federal and state constitutional rights to effective assistance of counsel. In support of this claim, petitioner alleged in substance that he had apprised his appellate counsel of the bases for his contentions that his guilty plea had not been knowing or voluntary and that his conviction and sentence had been the product of ineffective assistance of trial counsel; that appellate counsel had refused to raise what petitioner had believed was the arguable issue of ineffective assistance of trial counsel; and that appellate counsel instead had filed a Wende brief without even providing petitioner with a copy of the appellate record. (See Ans. Exh. 6 at 52-53).

Thus, the claim raised by petitioner to the California Supreme Court, insofar as it pertained to appellate counsel, was the same claim as that being raised by petitioner herein. Indeed, in their original Answer, respondents acknowledged that petitioner had exhausted his state remedies. (See Ans. at 2). In now contending that "petitioner never presented to the California Supreme Court a claim that the Wende brief filed by his appellate

counsel in the California Court of Appeal failed to comply with the requirements of Anders," respondents are confusing what the Court characterized in its Order re Further Proceedings as the real issue raised by petitioner's ineffective assistance of appellate counsel claim (which the Court noted respondents had failed to address), and the claim itself. Petitioner's ineffective assistance of appellate counsel claim clearly has been exhausted.

II: "The Teague doctrine survives the Antiterrorism and Effective Death Penalty Act."

This objection stems from a mischaracterization by respondents of the Report and Recommendation. The Court merely observed that by imposing a strict choice-of-law denied, 115 S. Ct. 1359 (1995); Chambers v. United States, 22 F.3d 939, 942 (9th Cir. 1994)("We do not create a new rule when we simply apply 'a rule of this general application,' [citation omitted] to a new set of facts."), vacated on other grds, 47 F.3d 1015 (9th Cir. 1995); Beam v. Paskett, 3 F.3d 1301, 1310 (9th Cir. 1993)(noting that "a rule is not 'new' simply because it is applied to a set of different facts"), cert. denied, 511 U.S. 1060 (1994). Nowhere in their objections do respondents address this proposition or the authorities cited by the Court for it.

As noted in the Report and Recommendation, petitioner's conviction here became final in June, 1996, twelve years after the Supreme Court had articulated in Strickland the standard for determining effective assistance of counsel; twenty-nine years after the Supreme Court had articulated in Anders what the obligations of appellate counsel are; and eight years after the Supreme Court had revisited Anders in McCoy and Penson, and explained how Strickland is to be applied to claims of ineffective assistance of appellate counsel. The Court also

notes that petitioner's conviction became final over six years after the Ninth Circuit held in United States v. Griffy, 895 F.2d 561, 562 (9th Cir. 1990), that the requirements imposed by the California Supreme Court in Wende did not satisfy the requirements imposed by the United States Supreme Court in Anders and McCoy. Thus, this is not an instance of the state being unaware of a new constitutional rule of criminal procedure at the time petitioner's conviction became final, or of the Court applying a new constitutional rule of criminal procedure, or of the Court extending or modifying settled constitutional principles. Rather, this merely is an instance of the Court applying settled constitutional principles to a particular set of facts, and Teague is not implicated.

III: "A holding that a Wende brief does not meet the requirements of Griffy would be a 'new rule' of criminal procedure under Teague, and thus cannot be applied in this habeas proceeding."

In this section of their objections, respondents merely have repeated verbatim the same arguments already made by them in their Supplemental Answer. (Compare Objections at 11-15 with Supplemental Answer at 17-20). The Court already has considered, addressed and rejected these arguments. As noted in the Report and Recommendation and reiterated above, Teague is not implicated when the petitioner merely is seeking application of an, existing normative rule to a new set of facts. Nowhere in their objections do respondents address this proposition or the authorities cited by the Court for it.

IV: "The Antiterrorism and Effective Death Penalty Act requires this Court to uphold the California Supreme Court's merits denial of petitioner's claims."

Preliminarily, the Court will address respondents' contention that, for purposes of application of the new standard of review, they are relying upon both the California Court of Appeal decision (on direct appeal) and the California Supreme Court decision (denying petitioner's habeas petition). (See Objections at 16). Under the new standard of review, a habeas petition may not be granted "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. S 2254(d). Thus, it is manifest that the new standard of review only applies to decisions adjudicating claims on the merits. Since the only filing in which petitioner raised an ineffective assistance of appellate counsel claim was his California Supreme Court habeas petition, it is nonsensical for respondents to contend that, for purposes of applying the new standard of review, they also are relying on a decision by the California Court of Appeal which did not even purport to adjudicate petitioner's ineffective assistance of appellate counsel claim.

Respondents' remaining arguments in this section of their objections are the same arguments already raised by them in their Supplemental Answer. (Compare Objections at 17-20 with Supplemental Answer at 7-9).

The Court already has considered, addressed and rejected these arguments.

Indeed, the Ninth Circuit's recent decision in Jones v. Wood, 1997 WL 312584 (9th Cir.), is completely dispositive of respondents' contention that the Court did not accord sufficient deference to the California Supreme Court's summary denial of petitioner's habeas petition containing his ineffective assistance of appellate counsel claim. In Jones, the Ninth Circuit held that petitioner was entitled to an evidentiary hearing on his ineffective assistance of counsel claims based on the alleged failure to investigate, because his allegations if proven would satisfy both prongs of Strickland under the de novo standard of review which the Ninth Circuit noted applied to ineffective assistance of counsel claims. See 1997 WL 312584, at *8. Further, the Ninth Circuit held that "[a]pplication of the AEDPA in this case would neither affect the appropriatene.ss of an evidentiary hearing before the district court nor preclude habeas relief on the merits of Jones' claims." Id. at *12. As the Court explained, "The facts developed in the course of the evidentiary hearing, in turn, would enable the district court to determine whether Jones qualifies for habeas relief under the AEDPA on the ground that the state courts' denial of his petition was contrary to clearly established law as announced by the Supreme Court--in this case, the requirement of effective assistance of counsel as announced in Strickland." Id.

Thus, the approach taken in the Report and Recommendation with respect to petitioner's ineffective assistance of appellate counsel claim appears to be mandated by Jones. It also is consistent with the approach espoused by the Ninth Circuit in Baylor v. Estelle, 94 F.3d 1321 (9th Cir. 1996), cert. denied, 117 S. Ct. 1329 (1997), which the Court cited in the Report and

Recommendation and which respondents have neglected to address in their objections. In Baylor, after engaging in de novo review of petitioner's ineffective assistance of counsel claim and concluding that petitioner had received ineffective assistance of counsel, the Ninth Circuit further concluded that its decision would be the same whether or not the new Act applied because the state court decision was contrary to clearly established federal law determined by the Supreme Court in Strickland. See 94 F.3d at 1325.

V: "California's Wende procedure comports with Anders."

In this section of their objections, respondents again merely have repeated verbatim arguments from their Supplemental Answer. (Compare Objections at 21-28 with Supplemental Answer at 10-16). The Court already has considered and rejected respondents' proffered construction of the Supreme Court's holdings in Anders, McCoy and Penson. Likewise, the Court~ already has considered and rejected respondents' attempt to trivialize and minimize the significance of the Ninth Circuit's construction of Anders and McCoy in Griffy.

VI: "Penson did not establish a rule of presumed prejudice."

In this section of respondents' objections, respondents again merely have repeated verbatim arguments made by them in their Supplemental Answer. (Compare Objections at 29 with Supplemental Answer at 21).

As discussed in the Report and Recommendation, the Supreme Court held in Penson that it was inappropriate to apply either the prejudice requirement of Strickland or the harmless error analysis of Chapman v.

California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), where the brief filed by appellate counsel failed to comply with the requirements of Anders. As the Supreme Court observed:

> "Finding harmless error or a lack of Strickland prejudice in cases such as this . . . would leave indigent criminal appellants without any of the protections afforded by Anders. Under the State's theory, if on reviewing the bare appellate record a court would ultimately conclude that the conviction should not be reversed, then the indigent criminal appellant suffers no prejudice by being denied his right to counsel. Similarly, however, if on reviewing the record the court would find a basis for reversal, then the criminal defendant also suffers no prejudice. In either event, the criminal appellant is not harmed and thus has no basis for complaint. Thus, adopting the State's view would render meaningless the protections afforded by Douglas and Anders." 488 U.S. at 86.

Rather, the Supreme Court held that prejudice must be presumed where there has been an actual or constructive denial of the assistance of appellate counsel. See 488 U.S. at 88-89.

In this section of their objections, respondents contend that Penson is distinguishable from this case, because petitioner's appellate counsel did not actually withdraw as petitioner's counsel of record. However, as discussed in the Report and Recommendation, the fact that appellate counsel did not formally withdraw does not render his ineffective assistance any less prejudicial. See Lofton v. Whitley, 905 F.2d 885, 888 (5th Cir. 1990)(holding that the failure to raise any grounds for appeal was the equivalent of withdrawal, for purposes of

applying Anders and Penson); see also Fern v. Gramley, 99 F.3d 255, 259 (7th Cir. 1996)(rejecting the state's attempt to distinguish Penson on the ground that counsel had been totally absent there; "[W]e confess that the difference between counsel who leaves the courtroom and counsel who effectively shuts the courtroom door to a client continues to elude us."). Nor does the fact that, in denying the Petition for Review, the California Supreme Court already has denied petitioner's ineffective assistance of trial counsel claim render appellate counsel's ineffective assistance any less prejudicial. As the Eighth Circuit held in Evans v. Clarke, 868 F.2d 267, 270 (Sth Cir. 1989), the state Supreme Court's consideration of petitioner's claims after he raised them pro se in a post-conviction proceeding "cannot be an adequate substitute or proxy for what Anders and Penson guarantee -- decision on appeal of all arguable issues only after fully adversarial briefing."

VII: "The California Court of Appeal and California Supreme Court properly found there were no nonfrivolous issues to raise on direct appeal."

In this final section of their objections, respondents again have repeated verbatim arguments from their Supplemental Answer. (Compare Objections at 30-32 with Supplemental Answer at 22-23).

As discussed in the Report and Recommendation, under Anders and McCoy, appellate counsel is required to "submit a brief on behalf of the indigent defendant presenting the strongest arguments in favor of their client supported by citations to the record and to applicable legal authority." United States v. Griffy, 895 F.2d 561, 563 (9th Cir. 1990). This appellate counsel simply failed to do here.

The Court identified two arguable issues in the Report and Recommendation which petitioner's appellate counsel could have identified and briefed. In their objections, respondents have failed to address the basis for the Court's conclusion that petitioner's appellate counsel could have identified and briefed petitioner's claim that trial counsel rendered ineffective assistance of counsel. The Court's conclusion was based inter alia on the failure of trial counsel to appear at the sentencing hearing, and trial counsel's relegating petitioner to representation by a codefendant's counsel who seemingly had a conflict of interest and who proceeded to submit without making a single argument on petitioner's behalf for a lesser sentence. Likewise, respondents have failed to address the basis for the Court's conclusion that petitioner's appellate counsel could have identified and briefed the claim that petitioner's guilty plea was not knowing and voluntary. As noted in the Report and Recommendation, this was the very issue raised by petitioner in his request for certificate of probable cause, which by granting the trial court was certifying was not totally frivolous. See Cal. Penal Code § 1237.5; People v. Ribero, 4 Cal. 3d 55, 62, 480 P.2d 308, 92 Cal. Rptr. 692 (1971).

RECOMMENDATION

For all of the foregoing reasons, IT IS THE MAGISTRATE JUDGE'S FINAL RECOMMENDATION that the District Court issue an Order: (1) approving and adopting the Magistrate Judge's initial Report and Recommendation and this Final Report and Recommendation; and (2) directing that Judgment be entered granting a conditional writ of habeas corpus, to the extent that petitioner shall be discharged from custody on the subject conviction unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal

and provides petitioner with new appointed counsel within 60 days of the entry of Judgment herein.

DATED: June 26, 1997

ROBERT N. BLOCK
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

Fourth Appellate District, Division Two, No. E016476

S051515

IN THE SUPREME COURT OF CALIFORNIA

==========

THE PEOPLE, Respondent

v.

JESUS GARCIA DELGADO, Appellant

==========

Appellant's petition for review DENIED.

/s/ LUCAS
Chief Justice

ORDER DENYING WRIT OF HABEAS CORPUS

No. S053431

IN THE SUPREME COURT OF CALIFORNIA

==========

IN RE JESUS GARCIA DELGADO

ON

HABEAS CORPUS

==========

Petition for writ of habeas corpus DENIED.

/s/ George
Chief Justice

APPENDIX E

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,

v.

JESUS GARCIA DELGADO,
Defendant and Appellant.

E016476
(Super. Ct. No. FSB 5856)

[UNPUBLISHED OPINION]
Filed December 18, 1995

APPEAL from the Superior Court of San Bernardino County. Patrick J. Morris, Judge. Affirmed.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

On November 23, 1994, the defendant was charged by an information the following counts in violation of the Health and Safety Code:[1] Count 1, manufacturing methamphetamine (§ 11379.6); count 2,

---

1. All statutory references are to the Health and Safety Code unless otherwise indicated.

possession of ephedrine (§ 11383); and count 3, possession of methamphetamine for sale (§ 11378). The following enhancements were attached: To count 1, the amount involved was in excess of 10 pounds by weight (§ 11379.8, subd. (a)), it involved proximity to a school (§ 11353.6, subd. (b)), and it involved more than 400 liters of methamphetamine (§ 11370.4, subd. (b)); to count 3, the amount was in excess of 400 liters by volume (§ 11370.4, subd. (b)) and in excess of 10 kilograms by weight (§ 11370.4, subd. (b)), and involved proximity to a school (§ 11353.6, subd. (b)).

On March 3, 1995, pursuant to Penal Code section 1192.7, the defendant, represented by counsel, pled guilty to counts 1, 2 and 3 and admitted the allegations filed pursuant to §§ 11379.8, subdivision (a) and 11370.4, subdivision (b), and in accordance with the negotiated disposition he was committed to state prison for 15 years, less custody credits, and the remaining allegations were dismissed on motion of the People. (Pen. Code, § 1385.)

Defendant appealed and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436, setting forth a statement of the case, a summary of the facts, and requesting this court to undertake a review of the entire record.

The defendant filed a personal supplemental brief which has been read and considered by this court.

We have now concluded our independent review of the record and find no arguable issues.

The judgment is affirmed.

NOT FOR PUBLICATION

/s/RAMIREZ
P.J.

We concur:
/s/RICHLI
J.

/s/McDANIEL
J.*

* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESUS GARCIA DELGADO,
Petitioner-Appellee,

v.

GAIL LEWIS, Deputy Warden; Attorney General of the State of California,
Respondents-Appellants.

No. 97-56162
D.C. No. CV-96-07241-R

ORDER
Filed July 12, 1999

Before: PREGERSON, D. NELSON and THOMAS, Circuit Judges.

Appellant Lewis has moved for a stay of the issuance of the mandate pursuant to Federal Rule of Appellant Procedure 41(b). Pursuant to the motion, issuance of the mandate is stayed until August 16, 1999.

APPENDIX G

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

JESUS GARCIA DELGADO,
Defendant and Appellant.

Case No. E-016476
Superior Court No.
FSB 5856
(SAN BERNARDINO COUNTY)

ON APPEAL FROM THE SUPERIOR COURT, SAN BERNARDINO COUNTY HONORABLE PATRICK MORRIS, JUDGE

OPENING BRIEF OF APPELLANT, REQUEST FOR INDEPENDENT REVIEW OF THE RECORD AND DECLARATION IN SUPPORT THEREOF

CHRISTOPHER BLAKE, #53174
4455 Lamont Street, #B
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(619) 274-1772
Attorney for Appellant
(Under Appointment by the
Court of Appeal Appellate
Defenders Independent
Case System)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JESUS GARCIA DELGADO, Defendant and Appellant.**	**Case No. E-016476** **Superior Court No. FSB 5856 (SAN BERNARDINO COUNTY)**

ON APPEAL FROM THE SUPERIOR COURT, SAN BERNARDINO COUNTY

HONORABLE PATRICK MORRIS, JUDGE

OPENING BRIEF OF APPELLANT, REQUEST FOR INDEPENDENT REVIEW

OF THE RECORD AND DECLARATION IN SUPPORT THEREOF.

TO THE HONORABLE MANUAL A. RAMIREZ, PRESIDING JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO:

Appellant JESUS GARCIA DELGADO hereby submits the following as his opening brief in the above entitled matter:

I
STATEMENT OF THE CASE.

On November 23, 1994, a three count information was filed charging appellant and five others -- Juan Jose Cuevas, Jose Maria Cuevas, Efigenia Medrano, Carlos Angino and Enrique Galvan -- with operating a methamphetamine laboratory. Specifically, they were charged with violating Health and Safety Code sections 11379.6 (manufacturing methamphetamine - count 1), 11383 (possession of ephedrine - count 2) and 11378 (possession of methamphetamine for purposes of sale - count 3). (CT 23-27).[1]

Two enhancements were also attached to count 1, to wit, Health and Safety Code section 11379.8, subdivision (a), subsection (3), involving an amount in excess of 10 pounds by weight; Health and Safety Code section 11353.6, subdivision (b), involving proximity to a school. On count 3, the school enhancement was also alleged as well as Health and Safety Code section 11370.4, subdivision (b), subsection (4), involving an amount in excess of 400 liters by volume and Health and Safety Code section 11370.4, subdivision (b), subsection (3), involving

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1. "CT" refers to the Clerk's Transcripts; "RT" refers to the Reporter's Transcripts of the hearing on the change of plea and sentencing.

an amount in excess of 10 kilograms by weight.[2] (CT 23-27).

In a Penal Code section 995 motion, appellants successfully challenged the school proximity enhancement. (CT 94). Their motion under Penal Code section 1538.5 was not, however, successful. (CT 95). On March 3, 1995, all six entered into a plea bargain. Appellant, Juan Jose Cuevas and Angino pled to all charges and admitted all enhancements but would receive a maximum term of fifteen years in state prison although they might receive a lesser sentence.[3] (CT 99-101, RT 14-15). The other three could receive sentences of up to seven years. (RT 17-18).

As part of the entry of the plea, appellant specifically waived his right to appeal the results of motions "filed in the Superior Court." (CT 100). No further mention is made in the record that appellant had waived his rights to appeal the denial of the Penal Code section 1538.5 hearing except a vague reference to giving "up your right of appeal in this case." (RT 16).

Appellant was sentenced May 30, 1995, to fifteen years consisting of the middle term of five years on count 1 plus a 10 year enhancement for the quantity enhancement of section 11379.8, subdivision (a), subsection (3). The sentence on the remaining counts were ordered were stayed. (RT 44-45).

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2. The information did not list the subsections with the specificity of this brief, just the code section followed by the quantity. While not the ideal practice, it does past muster insofar and notifying appellant of the offenses.

3. Appellant did not admit a specific subdivision of either of the two enhancements but simply pied guilty to the relevant enhancement although the court did mention the amounts of the weights involved in each enhancement. (RT 22-23).

II
STATEMENT OF THE EVIDENCE

The preliminary hearing in this case showed that all six defendants were found on the premises of a house located at 6906 Little League Drive in the Devore area of San Bernardino when that house was raided as a suspected methamphetamine lab on October 13, 1994 at 6:30 a.m. (CT 36-37). Appellant was found hiding underneath the house while the others were inside it or attempting to leave it. (CT 39-41).

The house was permeated with the odor of methamphetamine being prepared. (CT 42). The drug was found in quantities sufficient to justify the weight/volume enhancements of the information. In addition, various ingredients used in the manufacturing process such as hydriotic acid, red phosphorus, ephedrine, nalgene and so on were found. (CT 47-50). Various paraphernalia such as scales, packing materials, tubes, vats and so on were also located in the house and garage. (CT 43). Approximately 35 pounds of methamphetamine was recovered and over 100 gallons of ephedrine. (CT 66, 73). Also found was a 9mm weapon.[4] (CT 56).

Additional details from the probation report showed that at least two minors were found on the premises as well. In addition, appellant was married to Ms. Medrano and was related to the two Cuevas as brother and nephew. (Prob. Rpt. 3-5).

---

4. This formed the basis for a gun allegation against the two Cuevas and Ms. Medrano.

REQUEST OF APPELLATE COUNSEL, CHRISTOPHER BLAKE FOR THIS COURT TO UNDERTAKE AN INDEPENDENT REVIEW OF THE RECORD ON APPEAL.

Pursuant to the decision of the California Supreme Court in *People* v. *Wende* (1979) 25 Cal.3d 436, counsel for appellant respectfully requests this Court to conduct an independent review of the entire appellate record in order to determine for itself, whether the instant appeal contains any arguable appellate issues. By this request, however, counsel for appellant does not seek to be relieved as appellate counsel.

In *People* v. *Wende*, *supra*, the Court considered the obligations of appellate counsel and the reviewing court in preparing and ruling on an indigent appeal where counsel has been unable to discern any arguable issues. After reviewing the leading decisions of both the United States and California Supreme Courts [See *Anders v. California* (1967) 386 U.S. 738; *People v. Feggans* (1967) 67 Cal.2d 444; and *In Re Rash* (1964) 61 Cal.2d 491], the Court held that:

> ". . . *Anders* requires the court to conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous. This obligation is triggered by the receipt of such a brief from counsel and does not depend on the subsequent receipt of a brief from the defendant personally." (*People* v. *Wende*, *supra*, at 441-442)

People v. Johnson (1981) 123 Cal.App.3d 106,

defined an arguable issue on appeal as follows:

> "We hold that an arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel's professional opinion, must be meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential of success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment." (*Id.*, at 109)

It is not necessary that appointed counsel request leave to withdraw from the case "so long as he has not described the appeal as frivolous and has informed the appellant that [s]he may request the court to have counsel relieved if [s]he so desires." (*People v. Wende, supra*, at 442; see Declaration of Christopher Blake, *infra*.)

Appellant is aware that several courts have questioned whether Wende remains good law and whether courts should continue follow it. (*People v. Hackett* (1995) __Cal.App.4th , 95 Daily Journal D.A.R. 9692 (July 20, 1995, as A-067229); *In Re Sade C.* (1995) Cal.App.4th , 95 Daily Journal D.A.R. 10884, fn. 18 (August 11, 1995, as B-082230). The obligation of appellate courts to conduct Wende reviews in non-criminal cases is now pending before the California Supreme Court in the case of *In Re Angela G.* (1995) 33 Cal.App.4th 398, Review granted June 15, 1995. Whether the Court will review *Wende* generally or just its application to non-criminal cases has yet to be determined. In any event, appellant will assume

that this court will continue to honor Wende unless and until the Supreme Court states otherwise. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455-456).

Dated:

_____
CHRISTOPHER BLAKE, #53174
Attorney for Appellant,
JESUS GARCIA DELGADO

DECLARATION OF CHRISTOPHER BLAKE IN SUPPORT OF REQUEST FOR INDEPENDENT JUDICIAL REVIEW OF APPELLATE RECORD

I, CHRISTOPHER BLAKE, declare under penalty of perjury as follows:

That I am the attorney appointed by this Court to represent appellant JESUS GARCIA DELGADO on his appeal following his commitment to state prison for fifteen years after his plea of guilty to three felony violations of the Health and Safety Code for manufacturing and possessing methamphetamine.

That I have read and reviewed the entire record on appeal, consisting of the Clerk's Transcripts (1 volume) and the Reporter's Transcripts (1 volume);

That I have been unable to ascertain from this record an arguable appellate issue within the meaning of *People v. Johnson, supra*;

That I have discussed the case with appellant by letter of this date, which was sent to him at his last known address, explaining my evaluation of the record on appeal, accompanied with a copy of the instant pleadings and informed him of his right to file a supplemental brief in his own behalf;

That I do not, at this time, move to withdraw as counsel of record for appellant and will continue to be available;

That I have advised appellant that he may request this Court to relieve me if he so desires;

Wherefore, I respectfully invoke the procedures adopted by the California Supreme Court in People v. Wende, supra, and request this Court to conduct an independent review of the entire appellate record to determine whether any arguable issues exist. Should this Court so determine, I will diligently and professionally argue such issues.

Executed at San Diego, California.

Dated: September 1, 1995

_____

CHRISTOPHER BLAKE, #53174
Attorney for Appellant,
JESUS GARCIA DELGADO

PROOF OF SERVICE

I, CHRISTOPHER BLAKE, declare:

I am a citizen of the United States, over 18 years of age, and not a party to this action. My business address is 4455 Lamont Street, #B, San Diego, California 92109. On this date, I served one copy of the attached document, to wit:

Appellant's Opening Brief

on each of the individuals below by placing in the course of Messenger Service, addressed as follows, or in the course of Delivery by United States Mail, first class postage, prepaid, as follows:

Clerk of the Court
Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth St
San Bernardino, CA 92401

Distric Attorney
San Bernardino County
216 N. Mountain View Avenue
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Appellate Defenders, Inc.
233 A Street, Suite 1200
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Clerk of the Superior Court
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San Bernardino, CA 92415

Attorney General
110 West "A" Street
Suite 700
San Diego, CA 92101

Jesus Garcia Delgado, #J-64172
P.O. Box 8501
Coalinga, CA 93210

I declare under penalty of perjury the foregoing is true and correct.

Executed at San Diego, California.

Dated: September 5, 1995

/s/
CHRISTOPHER BLAKE

Supreme Court, U.S.
FILED
OCT 18 1999
CLERK

Docket No. 99-451

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

GAIL LEWIS, WARDEN, *et al*, Petitioners

v.

JESUS GARCIA DELGADO, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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Jesus Garcia Delgado
(Appointed by the Court of Appeals
Under the Criminal Justice Act)
Member of the Supreme Court Bar

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INTRODUCTION

In a petition most noteworthy for what it omits, petitioners ask this Court to grant certiorari to render an advisory opinion. For irrespective of what happens on the *Anders v. California*-related issues which are the only issues petitioners address, the District Court's conditional grant of habeas corpus must ultimately be affirmed. Whatever happens with the petition, there remain issues--easy issues to spot, which were raised below--which would inevitably result in affirmance even if this case returned to the Court of Appeals. *See United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). The simplest are:

(1) Respondent was totally denied counsel at sentencing, when his own appointed attorney failed to show up and also submitted no written materials on respondent's behalf; and

(2) Prior appellate counsel was ineffective in failing to raise that issue.

After respondent's attorney was a no-show at his sentencing, the attorney for a co-defendant--who was obtaining a superb result for her own client--purported to "stand in" for respondent. But like respondent's own attorney, the purported "stand-in counsel" didn't do anything on respondent's behalf. She just said: "Submitted." No one told respondent he could have his own attorney at his sentencing, let alone an attorney who would actually represent his interests. The result was a denial of counsel, and a breakdown of the adversarial system.

If there were any doubt that respondent's counsel didn't show up for his sentencing and another attorney ostensibly "stood in" but did nothing, respondent quotes petitioners' counsel: "Having somebody stand in is very common in the trial courts, certainly in the context of a . . . sentence." "Fed. Judge Blasts Calif. Defense Pair," *National Law Journal* (March 22, 1999), p. A6 [copy attached as Appendix B]. Thus, petitioners acknowledge that is what happened.

Far from "very common," it is virtually nonexistent. So it should be, since a defendant has the right to the advocacy of counsel at sentencing. That right is patently denied when the defendant's counsel doesn't show up and submits nothing in writing, and a co-defendant's attorney purports to "stand in" but also does nothing. Respondent attaches a transcript of what "stand-in counsel" did on respondent's "behalf" at sentencing, RT 44-45, as Appendix A.

It is long settled that if a defendant is totally denied the benefit of counsel at a critical stage of his proceedings, the defendant must be granted a single proceeding with the benefit of counsel. Sentencing is a critical stage of proceedings. *Mempa v. Rhay*, 389 U.S. 128, 134-37 (1967); *United States v. Gonzales*, 113 F.3d 1026, 1029 (9th Cir. 1997); *United States v. Breckenridge*, 93 F.3d 132, 135 (4th Cir. 1996); *Lopez v. Scully*, 58 F.3d 38, 41 (2d Cir. 1995). Denial of counsel at a critical stage is reversible *per se*. *United States v. Cronic*, 466 U.S. 648, 659 n. 25 (1984), and seven cases cited; *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *Glasser v. United States*, 315 U.S. 60, 76 (1942).

Thus it is clear that denial of counsel at sentencing is reversible *per se* as to sentencing, and the defendant remains entitled to a single sentencing with benefit of counsel. *E.g., Mempa v. Rhay*, 389 U.S. at 137; *Patrasso v. Nelson,* 121 F.3d 297, 304 (7th Cir. 1997); *United States v. Salemo*, 61 F.3d 214, 221-22 (3d Cir.), *cert. denied*, 516 U.S. 1001 (1995); *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992); *United States v. Mateo*, 950 F.2d 44, 48-50 & nn. 8-9 (1st Cir. 1991); *United States v. Taylor*, 933 F.2d 307, 311-12 (5th Cir.), *cert. denied*, 502 U.S. 883 (1991); *United States v. Balough*, 820 F.2d 1485, 1489-90 (9th Cir. 1987); *Golden v. Newsome*, 755 F.2d 1478, 1482-83 (11th Cir. 1985); *United States v. Daniels*, 558 F.2d 122, 127 (2d Cir. 1977).

In short, respondent is still entitled to that single sentencing with benefit of counsel, and will inevitably be granted that most basic of constitutional guarantees at some point, no matter how the issues in the current petition are resolved in other cases.

Petitioners have never claimed otherwise, despite numerous opportunities. In the Court of Appeals, respondent raised this issue in his Appellee's Brief (at 42-53). Petitioners would have had to respond in the Reply Brief to avoid waiving the issue. *See, e.g., Northwestern Indiana Telephone Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) (argument could not be made for first time on remand from this Court, citing Wright and Miller and other authority), *cert. denied*, 493 U.S. 1035 (1990); *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102, 1106 (9th Cir. 1988) (same), *cert. denied*, 490 U.S. 1006 (1989); *Moya v. United States*, 745 F.2d 1044, 1048 (7th Cir. 1984) (same). They didn't. So too when respondent raised this issue after the Court of Appeals's opinion, *see* Memorandum of Points and Authorities in Opposition to Motion for Continued Stay of Mandate, at 4, 7, 14, 16-17; Memorandum of Points and Authorities in Support of Request for Disposition of Appellee's Opposition to Stay, at 12-15: Petitioners never took issue with respondent's characterization of the facts or law.

The only real issue is how much longer respondent's case will be delayed before he gets that one sentencing with counsel. So far, it has been 4 1/2 years since respondent was sentenced without benefit of counsel. And although it shouldn't matter, this wasn't a proceeding on a stipulated sentence where counsel wouldn't have had much to do. Respondent was given the opportunity along with five other defendants to make a case for less than the maximum term under the plea agreement, and three of the five--all of whom had the benefit of counsel, of course--did obtain less than the maximum term.

Denial of counsel is perhaps the single most fundamental defect there could be in a criminal proceeding. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. at 654. Here, not only was respondent denied counsel at sentencing, prior appellate counsel then failed to raise this easy issue. The adversarial system broke down at sentencing, and then broke down again on appeal.

There is also the issue of co-defendant's counsel who purported to "stand in and submit" having a major conflict of interest. That issue was also not difficult to spot or discuss, though it is secondary to the denial of counsel because the purported "stand-in counsel" didn't do anything on respondent's behalf either. And although respondent supports the Court of Appeals' opinion in his case, he doesn't need any of the Court of Appeals' opinion to stand in order to prevail, because of the other issues adverse to petitioners as described above.

The instant petition seeks to add delay on top of delay in getting this case to where the Constitution clearly requires it to be, a grant of a single sentencing with benefit of counsel. That is all respondent seeks. On such a fundamental, basic issue, truly, "[j]ustice delayed is justice denied." John Bartlett, Bartlett's Familiar Quotations 446 (16th ed. 1992) [Prime Minister William Gladstone (1809-1898)].

With all of the above adverse issues squarely in their way--issues which petitioners have never contested, on either the facts or the law, and have by now waived--petitioners have instead taken the approach of simply ignoring them. Respondent does not agree that such major omissions should be rewarded with a grant of certiorari. Respondent respectfully asks this Court to follow its approach in another case, where the petitioner failed bring to this Court's attention adverse matters which would inevitably be fatal to the petitioner's cause:

"Were we to pass upon the purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion but also lending ourselves to an unjustifiable intrusion upon the time of this Court." *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969) (per curiam).

Finally, on the issues addressed in the petition, petitioners make claims about California's law on "no-merit briefs" that are not true. They ascribe to *People v. Wende*, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (1979) a procedure contrary to *Anders v. California*, 386 U.S. 738 (1967) that isn't anywhere in *Wende*, and which the California Supreme Court doesn't at all follow. The state Supreme Court follows *Anders*, as confirmed by its recent opinion in *In re Sade C.*, 13 Cal.4th 952, 55 Cal.Rptr.2d 771, 920 P.2d 716 (1996). *See also County of Kern v. Diller*, 69 Cal.App.4th 1412, 1418-20, 82 Cal.Rptr.2d 318 (1999) [*Wende* merely follows and is no broader than *Anders v. California*; following *Sade C.*]. Petitioners thus claim a conflict between the Ninth Circuit's opinion in this case and California law which is simply nonexistent, as both the Ninth Circuit and the California Supreme Court follow this Court's opinions in *Anders v. California*, 386 U.S. 738, and *Penson v. Ohio*, 488 U.S. 75 (1988). Petitioners also seriously misinterpret the Court of Appeals' opinion in this case, again seeking to create a "conflict" that simply doesn't exist.

Petitioners' omissions are numerous and material, and their petition seeks "relief" that is artificial and not substantive. That alone warrants denial of the petition. On top of that, petitioner's interpretation of California law and the Ninth Circuit's opinion doesn't hold water.

Respondent asks that the petition be denied.

STATEMENT OF PROCEDURE AND FACTS

The facts of the case are well stated in Judge Thomas's opinion for the Court of Appeals, *Delgado v. Lewis*, 181 F.3d 1087, 1089-90 (9th Cir. June 23, 1999), to which this Court may refer. In case it is of assistance, respondent briefly recounts the facts which appear most pertinent here. (References generally are to the Court of Appeals excerpts of record ["ER"]; other references are to documents filed in the California state proceedings.)

As part of a six-defendant information, Mr. Delgado was charged with manufacture of methamphetamine and related offenses. ER 26, 188. After a motion to suppress evidence and other pretrial motions were heard and denied, *see* ER 97, 99, the six defendants all entered into plea agreements. ER 133-39. In return, the trial court agreed to impose sentences with specified maximums, and to consider any materials and argument presented in support of sentencing below the maximum. ER 128-32.

For sentencing, counsel for five of the six defendants presented documents and arguments for mitigation in briefs, at the sentencing hearing, or both. ER 147-50, 161-69, 171-74, 177-78, 181-85. Three of those five defendants received sentences well under the trial court's stated maximum. ER 175, 179, 181-86.

Alone among the six defendants, Mr. Delgado had no presentation in mitigation made on his behalf. No sentencing brief or other documents were filed, and no witnesses or argument were presented at sentencing. ER 157-59. In fact, Mr. Delgado's appointed trial counsel was a total no-show at the sentencing hearing. ER 140, 143, 357. He also had been a no-show at Mr. Delgado's preliminary hearing, and had relied on a co-defendant's attorney to explain the guilty plea form to Mr. Delgado. ER 357.

At sentencing, one of the co-defendant's attorneys purported to act as "stand-in counsel." ER 143. This attorney had a major conflict, as she had obtained a court commitment of probation for her own client over the prosecutor's strong objection. ER 181-85, 357-58. When asked if "stand-in counsel" was OK, Mr. Delgado, who understood little English and had limited education in rural Mexico, said yes. ER 143, 188, 295. No effort was made to explain that he had a right to his attorney or could continue the hearing for that purpose, or the existence or nature of "stand-in counsel's" conflict. ER 143. "Stand-in counsel" merely submitted Mr. Delgado's sentencing, before securing probation fort her own client. ER 158, 182, 185. It is unclear whether Mr. Delgado had an interpreter at that time.

With no argument in mitigation on his behalf, Mr. Delgado received the maximum sentence permitted by the plea agreement, 15 years. ER 159.[1]

Subsequently, Mr. Delgado's appointed trial attorney obtained a certificate of probable cause, ER 113, California's requirement for permission to appeal most types of issues after a guilty plea. Cal. Pen. Code § 1237.5. A notice of appeal was filed with the certificate. ER 112. Another attorney was appointed for the appeal, on an "independent" basis. ER 201.

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[1] Despite the total absence of advocacy at sentencing, even this undeveloped record contains facts that would have given an advocate ample basis for argument in mitigation. Importantly, as the Ninth Circuit pointed out, Mr. Delgado, then 45, had no known criminal record. 181 F.3d at 1090; *see also* ER 231, 251. Beyond that, Mr. Delgado told the probation officer he and his wife were originally hired to do menial labor at the ranch where the meth lab was later set up, *i.e.*, maintenance and taking care of the animals. ER 194. Mr. Delgado fully admitted participation in the manufacturing operation, albeit a subsidiary role—he washed buckets of chemicals, and dumped buckets of methamphetamine liquid into strainer containers, doing what he was told (a role befitting someone who apparently shoveled animal manure). ER 193-94. Delgado's admission of responsibility, however, impressed the judge and persuaded him Delgado was telling the truth, at least to a substantial extent and more than any other defendant. ER 163-64.

Mr. Delgado's appellate attorney received a record that was missing the suppression motions and transcripts, some of the other preplea proceedings, and other relevant documents. *See* Application to Augment the Record on Appeal [post-grant of habeas], Cal. Ct. App. No. E016476, Oct. 14, 1997, at 2-9 (copy attached as Appendix C). The attorney did not request to augment the record to include these materials. *See ibid.*

The attorney told Mr. Delgado his appeal was "simply worthless." ER 256. The attorney then filed a no-merit brief, ER 201-13, with a short statement of procedure and prosecution evidence from the preliminary hearing, which failed to set forth any legal points, authority, or "anything [else] in the record that might arguable support the appeal." *Penson*, 488 U.S. at 80; *Anders*, 386 U.S. at 744. The no-merit brief asked the court to review the record, and included a declaration saying the attorney read the record and wasn't moving to withdraw. ER 201-13.

Through a "jailhouse lawyer," Mr. Delgado filed a *pro. per.* supplemental brief, arguing among other things that no one spoke on his behalf at his sentencing hearing, no one introduced anything on his behalf, his attorney didn't even show up, and "some woman" (a co-defendant's attorney) purported to stand in his attorney's place. ER 214-24. The Court of Appeal opinion recited a short procedural history, made no legal analysis, and concluded: "We have now concluded our independent review of the record and find no arguable issues. The judgment is affirmed." ER 226-28 (reprinted at Petn. App. E, at A-45 - A-47).

Now *pro. per.* and in prison, and without any transcripts (since his attorney hadn't sent them, *see* ER 358-59), Mr. Delgado filed a handwritten petition for review in the California Supreme Court. ER 230-31. The petition was denied without opinion. ER 235. Then, with the

help of a "jailhouse lawyer," Mr. Delgado filed a petition for habeas corpus in the California Supreme Court, alleging among other things that he couldn't read, write or speak English, and that his appellate counsel was ineffective and also never gave him his transcripts; and also repeating arguments from his *pro. per.* papers on appeal. ER 236-42. That petition was also denied without opinion. ER 257.

Again aided by a "jailhouse lawyer," Mr. Delgado filed a petition for habeas corpus with the U.S. District Court for the Central District of California. ER 258. The District Court granted the writ conditionally, subject to the State accepting jurisdiction over Mr. Delgado's appeal and appointing new counsel. ER 367.

On September 2, 1997, the California Fourth District Court of Appeal reinstated Mr. Delgado's appeal and appointed new counsel (the undersigned). Supp. ER 21. However, it later stayed the appeal in mid-briefing, over objection, a stay that has now been in effect for some 16 months. 2d Supp. ER 67-68, 75-93.

On February 22, 1999, the (federal) Court of Appeals affirmed the District Court's conditional grant of habeas corpus. *Delgado v. Lewis*, 168 F.3d 1148 (9th Cir. 1999, withdrawna and superseded on denial of rehearing). The State petitioned for rehearing.

On June 23, 1999, the Court of Appeals denied the petition for rehearing, and filed a modified opinion. *Delgado v. Lewis*, 181 F.3d 1087 (9th Cir. June 23, 1999). (Petitioners' characterizations of the original opinion in their procedural section, Petn. at 5, should be disregarded and stricken, because (i) they are argument and (ii) the original opinion was withdrawn and is a legal nullity.)

The State's petition for certiorari was filed on September 17, 1999.

ARGUMENT

I. Denial Of Counsel At Sentencing

As discussed above, Mr. Delgado was totally denied the benefit of counsel at sentencing. Sentencing is a critical stage of proceedings. *Mempa v. Rhay*, 389 U.S. 128, 134-37 (1967). Denial of counsel at a critical stage is reversible error *per se*. *United States v. Cronic*, 466 U.S. at 659; *Strickland v. Washington*, 466 U.S. at 692; *United States v. Gonzales*, 113 F.3d 1026, 1029 (9th Cir. 1997).

Thus by established law, denial of counsel at sentencing is reversible *per se*--not that the verdict should be reversed, but that the sentence should be reversed so the defendant can have a single sentencing with benefit of counsel. Courts have uniformly agreed. *See, e.g.*, cases cited *supra*, p. 2.

Respondent raised this issue as an alternative ground for affirmance in the Court of Appeals. 9th Cir. Appellee's Br. 42-53. Petitioners failed to address it or even mention it in their reply brief, thereby waiving the issue. *See supra*, p. 3. It wouldn't matter anyway, because the issue was so clearly meritorious when respondent raised it in the Court of Appeals. It still is, and it would be equally meritorious on any remand.

In light of that, the petition for certiorari asks this Court to rule on issues (the *Anders*-related issues) that in the end can't make any difference. The Court of Appeals will still be duty-bound to grant relief on respondent's issue, such that respondent will obtain one sentencing with benefit of counsel. The District Court's judgment conditionally granting the writ of habeas corpus will thus inevitably be affirmed.

The instant petition thus asks for what is effectively an advisory opinion. It won't matter to the disposition of this case whether certiorari is granted or denied, for respondent

will still be entitled to a sentencing hearing with benefit of counsel, and petitioners have never contended otherwise. If it is appropriate to dismiss certiorari when the petitioner "misstate[s] the facts in his petition so as to create a purely artificial and hypothetical issue," *Davis v. Jacobs*, 454 U.S. 911, 919 (1981) (Rehnquist, J., dissenting) (citing with approval *Conway v. California Adult Authority*, 396 U.S. 107), then it is appropriate to deny certiorari when the petitioner omits key facts and law to try to create a purely artificial and hypothetical issue.

On that basis alone, the petition should be denied. In the alternative, if the petition is granted, then the judgment should be affirmed on the merits based on this issue. *United States v. American Ry. Express Co.*, 265 U.S. at 435-36; *see infra*, p. 30.

II. Conflict Of Interest Of Co-Defendant's Counsel Who Purported To Submit Respondent's Sentencing In The Absence Of Respondent's Attorney

A second issue arising from the default of Mr. Delgado's trial counsel is the attempt of a co-defendant's attorney to "stand in" at sentencing, purportedly on Mr. Delgado's behalf. However, the "stand in" attorney didn't do anything for Mr. Delgado. She just purported to submit his sentencing. The co-defendant's attorney then finished getting her client an extraordinary result of probation over the prosecutor's strong objection. *See supra*, p. 7.

"Stand-in counsel" had a strong incentive not to rock the boat by getting a good result for a co-defendant, because that would increase the possibility the prosecutor would become fed up and pull out of the plea agreement, ruining her client's extraordinary result. That conflict, which should have been apparent to the trial court, *see Delgado v. Lewis*, 181 F.3d at 1094, was reversible error. *See Wood v. Georgia*, 450 U.S. 261, 271-74 (1981).

Instead of dealing with the conflict, the trial court sought to bypass it. The court noted Mr. Delgado's attorney was a no-show, and asked Mr. Delgado if the co-defendant's attorney

had permission "to specially act as [his] attorney in place of Mr. Haynal for the purposes of this judgment and sentence." Mr. Delgado, through an interpreter, said yes. RT 29:2-12.

While conflict-free representation can be waived, any waiver of such a fundamental right must meet the traditional standard of knowing, voluntary and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Every presumption is indulged against waiver of such fundamental rights. *Glasser v. United States*, 315 U.S. at 70.

Therefore, a defendant must know the existence and nature of the right to conflict-free counsel, know it can be exercised without undue burden, and understand the direct consequences of waiving it. *See, e.g., Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976); *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948).

For these reasons, when a court knows or should know of a possible conflict, it must determine that the defendant (1) has discussed the drawbacks of conflicted representation with counsel; (2) has been made aware of the dangers and drawbacks of conflicted representation; (3) knows of his right to conflict-free representation; and (4) voluntarily wishes to waive it. *People v. Mroczko*, 35 Cal.3d 86, 110, 197 Cal.Rptr. 52, 672 P.2d 835 (1983); *Gray v. Estelle*, 616 F.2d 801, 803-804 (5th Cir 1980). Routine inquiries uninformed by specific facts do not suffice. *Von Moltke v. Gillies*, 332 U.S. at 723-24.

Here, the trial court made no such inquiry. Nor did it try to determine whether Mr. Delgado was adequately informed of his rights. The record falls far short of the required detailed inquiry. It provides no assurance Mr. Delgado understood the nature—or existence—of his fundamental right to conflict-free counsel, or his right not to waive it.

Moreover, no one told Mr. Delgado that the purported "stand-in counsel" was going to do absolutely nothing for him at sentencing, just like his trial attorney.

Respondent raised this issue as well in his Appellee's Brief in the Court of Appeals (at 53-62). Like the denial of counsel issue, petitioners ignored the issue in their Reply Brief in the Court of Appeals. Their failure to respond to the issue was a waiver. *See supra*, p. 3. But waiver isn't necessary; the issue is clearly meritorious, and respondent is entitled to relief.

For this reason as well, the petition effectively asks for an advisory opinion. No matter how the issues in the petition are eventually decided, whether in this case or any other case, respondent will inevitably be entitled to his one sentencing with benefit of his own counsel. The discussion *supra*, pp. 10-11, is incorporated here by reference.

On that basis alone, the petition should be denied. In the alternative, if the petition is granted, then the judgment should be affirmed on the merits based on this issue. *United States v. American Ry. Express Co.*, 265 U.S. at 435-36; *see infra*, p. 30.

III. Failure Of Prior Appellate Counsel To Raise Either Of The Issues In I And II Above

There is also the issue of ineffective assistance of prior appellate counsel in failing to raise the denial of counsel and conflict of interest issues above.

These were hardly obscure issues. Denial of counsel, in particular, is one of the most fundamental and easily spotted issues imaginable. Prior appellate counsel was patently ineffective in failing to raise it. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Moreover, there can be no tactical basis for filing a brief (in any format) that raises no issues at all, when such easily spotted and clearly meritorious issues are in the record. Prior counsel's

failure to raise these issues was prejudicial under the standards of *Strickland v. Washington*, 466 U.S. at 693-94, as the issues were meritorious, and any would have resulted in relief.

Respondent made this argument as an alternative ground for affirmance in the Court of Appeals, in his Appellee's Brief (at 42-43). Petitioners failed to address it, or even mention it, in their reply brief. That failure was a waiver of any opposition. *See supra*, p. 3.

There is no opposition that could be made anyway. What legal argument could there possibly be, to overcome the law that guarantees respondent one sentencing with benefit of counsel? The record makes clear respondent never got that, and petitioners have never claimed otherwise. Prior appellate counsel could and should have raised the issue in a merits brief, and was prejudicially ineffective in failing to do so.

For this reason as well, the petition effectively asks for an advisory opinion. No matter how the issues in the petition are eventually decided, whether in this case or any other case, respondent will inevitably be entitled to his one sentencing with benefit of his own counsel. The discussion *supra*, pp. 10-11, is incorporated here by reference.

On that basis alone, the petition should be denied. In the alternative, if the petition is granted, then the judgment should be affirmed on the merits based on this issue. *United States v. American Ry. Express Co.*, 265 U.S. at 435-36; *see infra*, p. 30.

IV. Response To Petitioners' Claims

A. Merits

If this Court were to reach petitioners' claims, they have no merit.

To begin with, though it shouldn't matter (since the only issue in this Part should be the propriety of a brief without any advocacy), petitioners make various claims about what California courts require in no-merit briefs, wrongly dubbing their theory "California's *Wende* procedure." The petition then claims that the Court of Appeals disagreed with California law.

While this Court doesn't decide what state law is, since petitioners made the claims, respondent is obligated to answer: Both claims are patently in error. The California Supreme Court follows *Anders* and *Penson*. So did the District Court, and so did the Court of Appeals.

Petitioners claim that in *People v. Wende*, 25 Cal.3d 436, the California Supreme Court required a procedure contrary to *Anders v. California*, by which appointed appellate counsel who file a "no-merit brief" set forth only statement of procedure and evidence, and make no effort to provide any advocacy or analysis or to set forth spotted legal issues. Petn. at 11. [stating that *Wende* prohibits what *Anders* requires, appellate counsel "draw[ing] attention to 'anything in the record that might arguably support the appeal'"]. This is what petitioners call "California's *Wende* procedure" or a "*Wende* brief." Petn. at 5, 6, 7, 11, 12, 14, 15, 16, *etc.*

The California Supreme Court has no such "procedure," and never has. On the issue of whether appointed counsel filing a no-merit brief must engage in advocacy by setting forth legal issues or analysis for the Court, the *Wende* case merely followed *Anders*. *Wende*, 25 Cal.3d at 439-41 [describing and following *Anders*]; *accord In re Sade C.*, 13 Cal.4th at 980 [on issues of advocacy of counsel and contents of a no-merit brief, *Wende* required that "all

the steps required by *Anders* had to be taken"]; *Sade C.*, 13 Cal.4th at 981 [quoting *Anders*] ["[*Wende*] stay[ed] squarely in *Anders*' path, seeking to ensure that 'counsel acts in the role of an active advocate in behalf of his client.'"]; *see generally Sade C.*, 13 Cal.4th at 977-78 [discussing requirements of *Anders* favorably, as the law]; *Sade C.*, 13 Cal.4th at 979 [discussing an earlier California case {*People v. Feggans*, 67 Cal.2d 444, 62 Cal.Rptr. 419, 432 P.2d 21 (1967)}, which required a no-merit brief to discuss the law, as "a sound reading of *Anders*"]. Nor did *People v. Wende* state, require, or even permit what petitioners claim.

In particular, it is untrue that in *Wende* or anywhere else, "the California Supreme Court[] conclu[ded] that *Anders* does not obligate counsel to identify issues." Petn. at 12. Notably, petitioners never state what part of *Wende* or what other California Supreme Court opinion supposedly contains this holding. None exists.

If this Court had any doubt, respondent would respectfully urge it to review *Wende*, and especially, the state High Court's very recent opinion in *Sade C.* which recounts the history of that Court in *Wende* and related cases. What petitioners are claiming about the law set forth by the California Supreme Court--without stating where or how--simply doesn't exist.

Moreover, the Court of Appeals below didn't hold that "*Wende* is contrary to *Anders*." Petn. at 11. The procedure that the District Court held was contrary to *Anders* and *Penson*, in the judgment affirmed by the Court of Appeals, is the procedure used by prior counsel in this case. That is the procedure petitioners wrongly ascribe to *Wende*, by which appointed counsel filing a no-merit brief recites some facts and procedure, but doesn't spot issues, doesn't assist the reviewing court, and doesn't engage in advocacy. It is not a procedure which the California Supreme Court has ever required or permitted, in *Wende* or anywhere else.

But in the end it doesn't matter. For even if the state Supreme Court in *Wende* had required or permitted such a procedure, it is still patently contrary to *Anders* and *Penson*. Because prior appellate counsel in this case used a procedure contrary to *Anders* and *Penson*, the District Court correctly granted the writ. That is also why the Court of Appeals affirmed.

Petitioners try to distinguish this case from *Anders* by claiming prior counsel in this case did more than counsel in *Anders*, because counsel in this case also set forth "an extensive statement of the procedural and historical facts." Petn. at 11. Actually, prior appellate counsel here did virtually nothing, since he only recited some procedural history and historical facts, albeit none of the historical facts favorable to his client (discussed further below).

Beyond that, petitioners' claim is like trying to distinguish a black horse from a white horse. Neither in *Anders* nor in this case did appellate counsel provide any legal advocacy. Legal advocacy is a bedrock, fundamental requirement of the Sixth Amendment guarantee of counsel. *McCoy v. Court of Appeals*, 486 U.S. 429, 435 (1988); *Evitts v. Lucey*, 469 U.S. at 394; *United States v. Cronic*, 466 U.S. at 654-56 & n.17; *Anders v. California*, 386 U.S. at 743. Reciting some facts and procedural history doesn't qualify.

Worse still in this case, prior appellate counsel didn't even bother to recite facts that were favorable to the defendant. His recitation was of facts favorable to the prosecution. Facts in mitigation of sentence which would have been favorable to the defendant can be found in footnote 1, *supra* p. 7. Some can also be found in the Court of Appeals opinion.

Most importantly, prior counsel's brief had no legal advocacy. Without legal advocacy, there is no legal representation. A high school student could read a record of this nature, and recite facts and procedure. But courts do not appoint teenagers to provide legal representation.

The task of a lawyer is far greater: It is zealous legal advocacy. In the context of a "no-merit brief," legal advocacy may be the "strange form of advocacy" described in *McCoy v. Court of Appeals*, 486 U.S. at 439 n.13, whereby counsel indicates that (s)he thinks an appeals is frivolous and thus doesn't argue any legal issues (because counsel doesn't see any issues to argue). But even if rather "strangely," counsel still engages in legal advocacy by "draw[ing] attention to anything in the record that might support the appeal." *Penson*, 488 U.S. at 81; *McCoy*, 486 U.S. at 430, 440; *Anders*, 386 U.S. at 744.

Without advocacy, the adversarial system--the bedrock foundation of our system of justice--disintegrates. *United States v. Cronic*, 466 U.S. at 656-57 ["[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."]; *Herring v. New York*, 422 U.S. 853, 862 (1975) ["The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."]. Thus, a no-merit brief must contain advocacy of counsel.

Even petitioners backhandedly acknowledge the unshakable requirement that appointed counsel must engage in advocacy. Petitioners quote this Court's *Penson* opinion: "[F]ailure to file a brief 'deprived the court of the assistance of an advocate in its own review of the cold record on appeal.'" Petn. at 13 [emphasis added] [quoting *Penson*, 488 U.S. at 82 n.5].

Exactly: The reviewing court, and the judicial system, require advocacy. That is respondent's point.

Similarly, petitioners quote this Court's opinions in *Penson*, 488 U.S. at 80, *McCoy*, 486 U.S. at 430, 440, and *Anders*, 386 U.S. at 744: "[C]ounsel [under *Anders*] . . . must

include . . . 'a brief referring to anything in the record that might arguably support the appeal.'" Petn. at 13 [emphasis added]. Exactly: That is the requirement of advocacy, again.

This Court has repeatedly required advocacy of appointed counsel--in *Penson*, in *Anders*, in *Ellis v. United States*, 356 U.S. 674 (1958), and in plenty of other decisions. The District Court didn't make up that requirement just for this case, nor did the Court of Appeals in affirming the District Court. Both courts followed this Court. So does the California Supreme Court. By contrast, the required advocacy didn't exist in the no-merit brief in this case. That is why the District Court granted relief, and why the Court of Appeals affirmed.

In a no-merit brief, advocacy in the form of an *Anders* brief fulfills two functions that allow a court to ensure the proper and constitutional working of the adversarial system:

(1) Evidentiary: It permits the reviewing court to verify that despite the no-merit brief, appellate counsel has reviewed the record carefully and has done his or her best to engage in issue-spotting and analysis in the discharge of his or her duties; and

(2) Advisory: It helps guide the court in the discharge of its duty of reviewing the record to verify counsel's conclusion that there are no arguable issues, so that the court can protect the integrity of its proceedings, as well as its own appointment of counsel.[2]

See Penson v. Ohio, 488 U.S. at 81-82 [describing these "twin functions of the *Anders* brief"].

These are functions which must be performed by the reviewing court, because appointed counsel cannot unilaterally decide the defendant is not entitled to the benefit of

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[2] It also fulfills a third function, which is that forcing counsel to put pen to paper often makes counsel more careful, and forces him or her to think about the case. *See Penson*, 488 U.S. at 81 n.4. That would have been useful here. If this case might have seemed to prior counsel to have no issues at first look, a more careful look--including proper record augmentation, as discussed below--would have revealed issues that were easy to find, and as basic and fundamental as issues could be.

counsel for arguing issues. *Anders*, 386 U.S. at 742-43; *Ellis*, 358 U.S. at 674-75. Only the court can decide that. But the court can only so decide when there are no arguable issues.

For the court to make that decision, it must determine for itself that there are no arguable issues. That is the court's job, not counsel's. The court needs the advocacy of appointed counsel to do so, because a court cannot fulfill its functions unless counsel fulfill theirs. Even in a no-merit brief situation, we still have an adversarial system, which means the court takes its guidance from the parties' advocacy. *Herring v. New York*, 422 U.S. at 862. Counsel cannot default on those duties of advocacy, just as the court can't default on its duties of evaluation which are necessarily dependent on the advocacy of counsel.

If a court receives a no-merit brief like the one in this case, the adversarial system breaks down, and the court cannot perform its essential functions. Rather, it becomes appointed counsel who decides the defendant is not entitled to any advocacy. That is neither the proper function of an attorney, nor an action which would be taken by a zealous advocate.

In this case, prior appellate counsel failed to spot two easily recognizable issues, total denial of counsel at sentencing, and conflict of interest of purported "stand-in counsel" at sentencing. Those issues are discussed in Parts I and II above, pp. 10-13.

Petitioners, however, praise the "no-merit brief" of prior appellate counsel, and also appear to say Mr. Delgado's *pro. per.* brief was a good substitute for a brief of counsel. Petn. at 12 [2d full par.]. Notably, petitioners omit any mention of the overwhelmingly obvious and basic legal issues prior counsel missed. And of course, they omit any mention of the fact that there is no advocacy in prior counsel's "no-merit brief." Petn. at A-49 - A-61 (App. G).

Petitioners also fail to mention that prior appellate counsel failed to discharge his duty of obtaining a complete record with which to determine that there were no arguable issues. Attached in Appendix C is a copy of a record augmentation motion filed by respondent's new appointed counsel (after the reinstatement of the state appeal following the District Court's grant of habeas), which requested the Court of Appeal to issue an order augmenting the record with materials either required by California law or perceived as useful to the appeal. The Court of Appeal granted the record augmentation motion in full--over the objection of petitioners, no less. Copies of those documents are attached as Appendixes D and E.

Prior appellate counsel, by contrast, asked for no augmented records--even though California law permitted, and in some cases required, that the record contain extra materials. *See* Cal. R. Ct. 12, 33(a)-(b); *see also People v. Barton*, 21 Cal.3d 513, 519-20, 146 Cal.Rptr. 727, 579 P.2d 1043 (1978) (as much as preparing a proper brief, a duty of appellate counsel is to request record augmentation or correction when the appellate record is incomplete). One can hardly assume prior appellate counsel did his job when he engaged in no advocacy, missed routine meritorious issues, and wholly failed to obtain a proper appellate record.[3]

Although Mr. Delgado got to file a *pro. per.* supplemental brief after prior appellate counsel failed in his obligations, a *pro. per.* brief is not a substitute for the advocacy of

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[3] In *Penson*, Chief Justice Rehnquist's dissent stated that appointed counsel said he had conscientiously reviewed the record, "and we have no reason to disbelieve him." *Penson*, 488 U.S. at 91 (Rehnquist, Ch. J., dissenting). While this was not the test adopted by this Court in *Penson*, it is still worth noting that here, (prior) appointed counsel never said he "conscientiously" reviewed the record; and if he had, we would have had reason to disbelieve him. For in this case, appointed counsel failed to make any effort to obtain an augmented record as permitted by California law, in order to obtain a full record for determining whether there were any arguable issues. Despite this, prior counsel told his client that the appeal was "simply worthless." ER 256.

counsel. This Court has recognized this from at least *Powell v. Alabama*, 287 U.S. 45, 69 (1932), and specifically recognized it for appeals in *Evitts v. Lucey*, 469 U.S. at 394.

Here, the state Court of Appeal did what is too easily done with *pro. per.* filings by people with little education or language skills: The Court gave little heed to the supplemental *pro. per.* brief, and didn't discuss any of it. The Court simply said it read the supplemental brief, it found no arguable issues, and the judgment was affirmed. ER 226-28 (reprinted at Petn. App. E, at A-45 - A-47). The state Court of Appeal may have found no arguable issues after reading Mr. Delgado's *pro. per.* supplemental brief, but it had no advocacy of counsel to guide it. That hardly vindicates respondent's fundamental right to counsel.

Petitioners claim Mr. Delgado received more from prior counsel than a conclusory statement that the appeal had no merit and counsel wouldn't file a brief. Petn. at 19. That is not true in any material sense, though it is true literally: Mr. Delgado also received advice that his appeal was "simply worthless," ER 256, when the appeal had meritorious issues which should have been easily spotted. Mr. Delgado also received the burden of having to make *pro. per.* arguments without transcripts, which were not sent to him. *See* ER 358-59. It is also true that Mr. Delgado received a rote recitation of procedure and facts from prior appellate counsel, though no facts favorable to Mr. Delgado. *See supra*, p. 7, fn. 1. That does not separate an unconstitutional brief from a constitutional one.

Were there any doubt on that last score, respondent would refer this Court back to *Ellis v. United States*, 356 U.S. 674, where the defendant received much more than Mr. Delgado. It didn't matter: Because the brief in *Ellis* had no advocacy, it failed the minimum standards for a no-merit brief. *See Anders*, 386 U.S. at 744-45. So did the no-merit brief here.

Petitioners sound a false alarm about California having to "restructure its entire judicial system" if California courts followed *Anders*, Petn. at 8, as the California Supreme Court always has. There are no facts on the "structure of the California judicial system" in the record of this case. A claim based on facts not in the record should be disregarded. *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 486 n.3 (1986).

Respondent suspects petitioners' alarm is merely a recycled version of their theory of what the California Supreme Court supposedly required in *Wende*. Respondent answers again: *Wende* neither says nor implies what petitioners claim. On the issue of appointed counsel's duties of advocacy, *Wende* directly follows *Anders*. *See Sade C.*, 13 Cal.4th at 977-81. And the California Supreme Court recently reiterated that it follows *Anders* on this issue of advocacy, and has always done so. *Sade C.*, 13 Cal.4th at 980-81; *see supra*, pp. 15-16.[4]

Petitioners try to distinguish *Penson* on the ground that there were arguable issues in *Penson*. Petn. at 18. That is no distinction. As respondent has repeatedly stated and petitioners have never contested, this case has issues that are not only arguable, but clearly meritorious.

Beyond that, petitioners put the cart before the horse. If an appellate court mustdecide whether there are arguable issues before determining whether a no-merit brief complies with *Anders*, then *Anders* has no meaning. For a court to decide whether there are arguable issues, it must decide what the law is in the legal areas relevant to those issues, and how that law

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[4] Petitioners also try to broaden their self-created "conflict" or "split" by citing opinions from two other states, Oregon and Arizona, which eschew *Anders* as petitioners claim California supposedly does. Petn. at 14. Petitioners fail to mention that the California Supreme Court has expressly rejected the Oregon opinion, holding the Oregon Supreme Court "erred" by rejecting *Anders* and *Anders*' requirement of advocacy. *In re Sade C.*, 13 Cal.4th at 980 n.8 [rejecting *State v. Balfour*, 311 Or. 434, 814 P.2d 1069, 1079 (Ore. 1991)]. The Arizona case is from an intermediate court, and a petition for review is pending (no doubt awaiting this Court's opinion in *Smith v. Robbins* (U.S. No. 98-1037, cert. grd. March 8, 1999)).

relates to the record. If a court does that, it has done everything necessary to decide the issues, so it doesn't need *Anders*. But then it would still have to decide issues without advocacy from the appellant's counsel, again defeating the working of the adversarial system.

The paradigm established by this Court is much simpler. A no-merit brief must contain advocacy. But unlike a merits brief which contains advocacy by its very nature, a no-merit brief could be written either with or without advocacy. The *Anders/Penson* requirements ensure there is advocacy in a no-merit brief. They also help the reviewing court perform its twin functions after receiving a no-merit brief: Evidentiary, to show the reviewing court that counsel really was acting as an advocate even though counsel didn't engage in traditional advocacy (by arguing the merits), and advisory, to point the court to factual and legal areas which will help it in its review of the record, so the court can maximize the likelihood that it has protected the integrity of the judicial process and the defendant's right to counsel.

As matters stood, Delgado's right to counsel on appeal was utterly trampled, after his right to counsel at sentencing was trampled before it. Mr. Delgado didn't have the merits argued, even though he had meritorious issues. Mr. Delgado didn't even get the benefit of the minimum brief of an advocate. His prior appellate attorney also didn't request further record portions to make an intelligent decision on what to brief or not to brief. His prior appellate attorney didn't even bother to send him the transcripts. His prior appellate attorney thought a case involving a total denial of counsel had an appeal that was "simply worthless."

The only thing that was worthless was prior appellate counsel's brief. It contained no advocacy, it did respondent no good, and it did the reviewing court no good. By any standards, it flunked the minimum advocacy required by this Court and the Constitution.

B. Petitioners' AEDPA Claims

Apparently seeking to invoke the AEDPA, petitioners also claim that their erroneous view of California Supreme Court caselaw in other cases is not contrary to or an unreasonable application of this Court's law. Petn. at 12-13. As discussed above, petitioners are simply wrong about what California Supreme Court caselaw really says.

Beyond that, the AEDPA, 28 U.S.C. § 2254(d), doesn't have anything to do with what happened in other cases. It deals with whether the state court's ruling in this case is contrary to, or an unreasonable application of, clearly established law set forth by this Court.

In this case, on the one issue decided by the District Court and the Court of Appeals, the only relevant state court ruling was the state Supreme Court's postcard denial of respondent's habeas corpus petition alleging ineffective assistance of appellate counsel. No one can know what reasons or criteria the state Supreme Court used to deny the petition. The denial may well have been because the state Supreme Court has very selective criteria for review and this case didn't fit any. *See* Cal. R. Ct. 29.

Because there is no way to know what reasons or criteria the state Supreme Court used to deny the petition, there are no findings or conclusions below to which a federal court might give deference under the AEDPA. A court cannot defer to something that doesn't exist. The same is true on the denial of counsel and other issues not reached by the Court of Appeals below: The state Supreme Court's denial of review was summary, none of petitioner's issues were presented with benefit of counsel, and the state Court of Appeal gave no indication it engaged in full adversarial adjudication of any issues on the merits.

In making their various AEDPA arguments, petitioners also claim there is a distinction between this case and *Penson*, on the ground that appointed counsel sought to withdraw in *Penson*, but didn't do so here. Petn. at 16-18.

If that is a distinction, it is one without a difference. An attorney who engages in no advocacy, whether or not (s)he moves to withdraw, provides the same amount of advocacy: None. Neither course satisfies any constitutional requirement. "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." *Strickland v. Washington*, 466 U.S. at 685. "The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *United States v. Cronic*, 466 U.S. at 654-55 [citation omitted].

The Court of Appeals was correct in holding that a summary denial with no reasons given is not entitled to deference under the AEDPA, because there was nothing to which to "defer." The only "opinion" was the state Supreme Court's summary denial of Mr. Delgado's habeas corpus petition, which stated no reasons. There was still no opinion to which to defer. And even if the summary denial with no reasons was entitled to "deference," "deference" doesn't mean "abdication." A federal court would still grant relief where, as here, the state court opinion was patently incorrect based on clearly established law of this Court.

Even if one were to consider the direct appeal, the result would be the same. The state Supreme Court summarily denied review with no reasons given. Previously, the state Court of Appeal issued an opinion summarily affirming, with no factual findings or legal conclusions, in a posture where the defendant had no advocacy of counsel (and didn't even have his transcripts). A felony proceeding without benefit of counsel is void. *Burgett v. Texas*, 389 U.S. 109, 115 (1967). Again, there simply is nothing to which to defer.

Petitioners, however, summon up the words "independent review" in the Court of Appeals' opinion, as if they meant the Court of Appeals had made up its own law, rather than

following the AEDPA's edict that lower courts must follow "clearly established Federal law, as determined by the Supreme Court of the United States." Petn. at 19-20. They didn't. The District Court and the Court of Appeals used exactly the source of law the AEDPA requires, this Court's clearly established opinions such as *Anders* and *Penson*.

Petitioners also discuss the original opinion that was expressly withdrawn by the Court of Appeals, and terminology used in that opinion, as if a withdrawn opinion could have some sort of significance. *See* Petn. at 20. It has none. It is withdrawn, and is thus in no way the ruling of the Court of Appeals. *See, e.g., Gelfuso v. Bell*, 590 F.2d 754, 755 (9th Cir. 1978) [upon withdrawal, opinion becomes a nullity]. The discussion is thus inappropriate.

It has no merit anyway. In the context of the only opinion that exists (the June 23 opinion), "independent review" only means what the Court of Appeals held: When the state court has not engaged in adversarial adjudication and thus has not made any findings or conclusions, a federal court has nothing to which to defer. In that event, it decides for itself--*i.e.*, independently--whether the state decision was contrary to or an unreasonable application of clearly established law of this Court. *See Delgado v. Lewis*, 181 F.3d at 1091 & n.3.

Petitioners claim some sort of conflict on an issue of whether a state court opinion requires reasoning to warrant deference under the AEDPA. *See* Petn. at 21-24. That is a non-issue in this case, and it is based on a mischaracterizion of caselaw.

None of the cases petitioners cite for the "conflict," Petn. 21 [last partial par.]-22 [top partial par.], stand for what they claim. In *Hollman v. Wilson*, 158 F.3d 177, 180 n.3 (3d Cir. 1998) (cited in Petn. at 21-22), the state court held an evidentiary hearing on the relevant claim, then rejected it based on specific conclusions. That doesn't implicate petitioners' issue.

Parker v. Angelone, 959 F.Supp. 319, 322-323 (E.D. Va. 1997) and *McLee v. Angelone*, 967 F.Supp. 152, 156-57 (E.D. Va. 1997) (cited in Petn. at 22), both of which had at least some ruling on the merits that didn't exist here, have been overruled on this point by the Fourth Circuit, which governs the Eastern District of Virginia. *Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir.) [cited with approval in *Delgado v. Lewis*, 181 F.3d at 1091], *cert. denied*, 67 U.S.L.W. 3374 (U.S. Dec. 3, 1998); *accord Wilson v. Moore*, 178 F.3d 266, 280-81 (4th Cir. 1999) (following *Cardwell*). Again, neither of these opinions creates a conflict.

Indeed, the Fourth Circuit's holding in *Cardwell* fully supports respondent: "[B]ecause the state court decision fails to articulate any rationale for its adverse determination of Cardwell's claim, we cannot review that court's application of 'clearly established federal law,' but must independently ascertain whether the record reveals a violation of Cardwell's Sixth Amendment right to the effective assistance of counsel." 152 F.3d at 339.

Petitioners' other cases are clearly irrelevant here. *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998), cited in Petn. at 22, involves the different issue of what source of law is used in a federal court's collateral review. It is self-evident that only clearly established law of this Court may be used. The District Court and Court of Appeals did so here, as *Anders*, *Penson*, and other relevant opinions have long been clearly established by this Court. And *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997), cited in Petn. at 22, involved review of a claim specifically discussed by a state court in a written opinion, with no indication the defendant was denied his right to an advocate. That has nothing to do with this case.

In short, there is no conflict among the courts on the "issue" proffered by petitioners. But none of this should matter here anyway. The only issue here is what if any effect 28 U.S.C. section 2254(d) has on this case. Section 2254(d) states in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

On the one issue decided by the District Court and the Court of Appeals, the state court decision not to grant relief was "contrary to . . . clearly established Federal law, as determined by [this Court]." The "clearly established federal law, as determined by [this Court]" was *Anders*, decided in 1967, and *Penson*, decided in 1988. That mandates relief.[5]

As to the issues not decided in the Court of Appeals opinion, the denial of counsel, conflict of interest and ineffective assistance of appellate counsel issues discussed in Parts I-III above, the result is the same, and petitioners have never argued otherwise. *Strickland v.*

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[5] The "unreasonable application of clearly established law of [this Court]" prong of section 2254(d)(1) doesn't apply, because there is nothing to show that the state court decision ever tried to "apply" the law of this Court. Something cannot be an unreasonable "application" if there was no "application" in the first place. Moreover, since the word separating the two clauses of section 2254(d)(1) is "or" and not "and," only one of those two clauses needs to be satisfied for the writ to issue. Here, the "contrary to" clause is satisfied. However, even if one were to use the "unreasonable application" clause, the result would be the same: Prior appellate counsel's brief violated the clearly established law of cases such as *Anders*, *Penson* and *Ellis*. Had the state court believed otherwise, the belief would have been unreasonable. The requirements of this Court's prior cases (*Anders*, *Penson*, *Ellis*, etc.) are clear, and prior appellate counsel's brief obviously didn't meet them.

Washington, *United States v. Cronic*, *Evitts v. Lucey* and like cases have long been the law clearly established by this Court. The violations described above are patently contrary to it.

With abdication of counsel at sentencing, and again on appeal, this case is as egregious an example of constitutional violations as there could be. If the AEDPA barred relief in this very extreme case, then it would seem no state case could result in federal habeas relief. That is probably impossible. *See* U.S. Const., Art. I, § 9, cl. 2 [Suspension Clause]; *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969). It is certainly not what Congress did in the AEDPA.

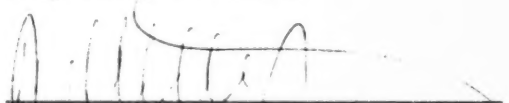
SEPARATE GROUNDS FOR AFFIRMANCE

If the petition were to be granted, then respondent asks this Court also to consider the issues in Parts I, II and III above, as separate grounds for affirmance. A respondent is entitled to make such a request without a cross-petition. *Reno v. Flores*, 507 U.S. 292, 300 n.3 (1993); *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979). A respondent may support the judgment on any grounds, whether or not decided below. *Ibid.*; *see generally United States v. American Express Ry. Co.*, 265 U.S. 425, 435 (1924).

These are the same issues respondent raised as alternative grounds for affirmance in the Court of Appeals. *See* Appellee's Br. 41-63. He does so again here. Respondent asks this Court to affirm on these grounds, for the reasons in this answer. *Supra*, Parts I, II and III.

Dated: October 17, 1999.

Respectfully submitted,



Michael B. Dashjian
Counsel of Record for the Respondent

Appendix A

Transcript Excerpts Of Respondent's Sentencing
(See Answer To Petition, p. 2)

MR. MORRIS: Your Honor, Mr. Cuevas has also indicated to me he is requesting that he be ordered transferred immediately to state prison.

THE COURT: I'll order his transportation forthwith to California State Prison.

MR. MORRIS: Thank you.

THE COURT: Thank you very much.

DEFENDANT JUAN CUEVAS: Thank you, your Honor.

THE COURT: Let's see. It's 12 noon right now, counsel. I know that Mr. Vodnoy has an obligation in another court at 1:30 in Los Angeles; is that correct, sir?

MR. VODNOY: Yes, your Honor -- West Covina.

MR. CURRIE: I do also, your Honor, at 1:30 Pomona court.

THE COURT: All right. So that's Enrique Galvan, is that correct?

MR. CURRIE: Yes.

THE COURT: You have a jury trial also?

MR. WAITMAN: Department 8 at 10:30.

THE COURT: At 10:30, yeah.

Well, will the staff mind if we stayed here for a while? All right, we will keep going.

In the matter of Jesus Garcia Delgado.

MS. BRZUSKA: Yes, your Honor. I'm appearing.

THE COURT: You're appearing on behalf of Mr. Haynal?

MS. BRZUSKA: Yes.

THE COURT: The Court has before it the probation, -- the weekly report prepared and filed by the probation office that I've read and considered. I've received no other documentation in connection with this case. Let me give you an indicated sentence to -- the Court in this case would -- is thinking 15 years, which is the limit of the plea agreement we reached previously. You may respond to that if you desire.

MS. BRZUSKA: Your Honor, I'm just going to submit it on basically the Court's judgment as to exactly how much time Mr. Delgado should get.

THE COURT: All right. Mr. Hidalgo, any comments?

MR. HIDALGO: I think I've said enough already.

THE COURT: All right. In this matter, the Court will make the following findings: A motor vehicle was not involved. The defendant does not have the ability to reimburse the county for court-appointed counsel fees or investigation costs or other fees. I will order a $1,000 restitution fine. That will be imposed.

The Court finds in this case that the facts in aggravation outweigh those in mitigation. Mr. Delgado, though not "Mr. Big," is, in the Court's view -- has been identified, I think, in the probation report as the subchief of this operation. That is my belief as well. At the age of 45, this man, though without prior criminal record, was deeply invested in this operation. The manner in which this operation was carried out indicates prior planning. It indicates

sophistication. And Mr. Delgado admitted to playing a role in the precursors to finished meth oil.

The crime involves a great quantity of contraband, 35 pounds of finished methamphetamine, seized under the search warrant. The only mitigating factor is the fact that he had no prior criminal record.

The Court will, therefore, sentence the defendant pursuant to our agreement as follows: On Count 1, the manufacturing of methamphetamine, violation of Section 11379.6(a) of the Health and Safety Code, the middle term of five years. With the enhancement of exceeding 400 liters, 105 gallons by volume, violation 11370.4 --

MR. HIDALGO: That's incorrect.

THE COURT: Strike that. It's the 10-year enhancement. It is the enhancement of a substance exceeding 25 gallons, Section 11379.8, of 10 years on Count 1. On Count 2, the possession of Ephedrine with intent to manufacture, violation of Health and Safety Code Section 11383, the middle term of four years to be served concurrent to that time served in Count 1. On Count 3, possession of methamphetamine for sale, violation of Section 11378 of the Health and Safety Code, the middle term of two years, to be served concurrent with time required to be served in Counts 2 and 1.

So total time -- we had the enhancement of

manufacturing of 105 gallons in Count 1. That's to be stricken, and that will be stricken. We agree that that was an improper allegation as to Count 1; is that correct?

MR. HIDALGO: Yes.

THE COURT: All right. That will be stricken. The other enhancements -- you alleged enhancements in Counts 3 as well; is that correct?

MR. HIDALGO: Yes.

THE COURT: Those enhancements, pursuant to Penal Code Section 11370.1, will be stayed pending the successful completion of the sentence agreed upon in this court and now imposed upon the defendant. And upon the successful completion of those sentences, those will be permanent stays.

That should do it. Is there anything else in relation to Mr. Delgado?

MR. HIDALGO: I believe that is it, your Honor.

THE COURT: Mr. Delgado, good luck to you, sir.

DEFENDANT DELGADO: Thank you.

THE COURT: The credits are the same as the codefendants. 230 actual, 115 good conduct, for total of 345 credits for time served.

MR. HIDALGO: To be followed by a period of parole.

THE COURT: To be followed by three to four years prison parole. Yes. Thank you.

In the matter of Carlos Angino. Mr. Vodnoy.

MR. VODNOY: Yes, your Honor.

THE COURT: Mr. Vodnoy, it's difficult to say, based upon the statements of all these defendants, who's who and what's what with regard to this lab. There's a lot of finger pointing with one exception, and that was Jesus Delgado. He is the one guy that did assume responsibility. That's the one man who in some ways said it like it was.

Appendix B

Statement Of Petitioners' Counsel
***National Law Journal*, March 22, 1999**
(See Answer To Petition, p. 1)

Monday, March 22, 1999

Fed. judge blasts Calif. defense pair

But even the government says 9th Cir. got it wrong.

BY DAVID E. ROVELLA
NATIONAL LAW JOURNAL STAFF REPORTER

THE FIERY DENUNCIATION of two California lawyers by a federal appeals court has spurred an unlikely alliance between a prosecutor and two defense lawyers against a federal judge and a convicted methamphetamine manufacturer.

In a Feb. 23 ruling affirming the granting of Jesus G. Delgado's habeas petition, Judge Sidney R. Thomas, of the U.S. Court of Appeals for the 9th Circuit, said that the "absence of any meaningful legal assistance" by court-appointed trial lawyer Andrew J. Haynal, of Redlands, Calif., and appellate counsel Christopher J. Blake, of San Diego, "makes a mockery of the representation of indigent defendants contemplated by the Supreme Court."

He railed against Mr. Haynal's absence from most of Mr. Delgado's court appearances after the defendant's 1994 arrest, leaving his client in the hands of other lawyers, whose clients had conflicting interests. The judge blasted Mr. Blake's failure to base Mr. Delgado's appeal on ineffective assistance of counsel, noting acidly that while one of the five co-defendants who plead guilty received probation, Mr. Delgado, with no lawyer at his sentencing and no criminal record, received the maximum 15 years. The judge concluded that to turn down Mr. Delgado's petition would "render the clear sound of Gideon's trumpet quiet and meaningless as wind in dry grass."

'Wende' procedure

California Deputy Attorney General Sabrina Y. Lane, who filed a petition for rehearing en banc, calmly dismissed the opinion's hyperbole while coming to the defense of Messrs. Haynal and Blake.

"Having somebody stand in is very common in the trial courts, certainly in the context of a preliminary hearing and sentence," she said. As for Mr. Blake, she added that "he did exactly what he should have done under California's *Wende* procedure. In fact, the defendant received a higher level of review than if [Mr. Blake] had raised a single question."

Under *People v. Wende*, explained Mr. Blake, if a defendant appeals but there are no nonfrivolous grounds, a lawyer in California can leave it to the state appeals court to make an independent review of the facts. Mr. Blake countered Judge Thomas' admonitions by saying that the ineffective-assistance-of-counsel issue is usually raised in a habeas petition, as it was in this case, and that by following *Wende*, he allowed the state appeals court to look at any issue it thought pertinent. "The 9th Circuit made no attempt to educate itself as to what the *Wende* procedures are," said Mr. Blake. Mr. Haynal did not return calls.

But Mr. Delgado's current lawyer, Michael B. Dashjian, of Solvang, Calif., said that Mr. Haynal's absences and Mr. Blake's failure to raise the ineffective-assistance-of-counsel issue resulted in his client going without effective representation for "a good three years."

Appendix C

Respondent's Motion To Augment The Record
In The State Court Of Appeal After Grant Of Habeas
(See Answer To Petition, pp. 8, 21)

MICHAEL B. DASHJIAN
State Bar No. 111072
LAW OFFICES OF MICHAEL B. DASHJIAN
606 Alamo Pintado Rd. Suite 119
Solvang CA 93463
(805) 686-0700

Attorney for Appellant
Jesus Delgado

FILED
OCT 14 1997
COURT OF APPEAL FOURTH DISTRICT

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JESUS DELGADO, Defendant and Appellant	Court of Appeal No. E016476 (San Bernardino County No. FSB 05856)

APPLICATION TO AUGMENT THE RECORD ON APPEAL AND FOR EXTENSION OF TIME

TO THE HONORABLE MANUEL RAMIREZ, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO:

Pursuant to Cal. R. Ct. 12(a), appellant Jesus Delgado, through his undersigned counsel, respectfully requests that this Court augment the record to include the materials below.

This is an appeal from a judgment of conviction based on a plea of guilty, as part of a six-defendant plea agreement, to one count of manufacture of methamphetamine, in violation of Health and Safety Code section 11379.6; one count of possession of chemicals with intent to

COPY

manufacture, in violation of section 11383; and one count of possession of methamphetamine with intent to sell, in violation of section 11378, with weight enhancements under sections 11379.8 and 11370.4, subdivision (b). Appellant was sentenced to a term of 15 years.

In appellant's original appeal, a brief was filed by (former) appellate counsel pursuant to *People v. Wende* (1979) 25 Cal.3d 436, and a supplemental brief was filed by appellant *pro. per.* This Court affirmed the judgment on December 18, 1995. (Aug. CT 2.) After the Supreme Court's denial of appellant's petition for review, the remittitur issued in this Court on March 19, 1996. (Aug. CT 1.)

Subsequently, on July 2, 1997, appellant's petition for a writ of habeas corpus to the U.S. District Court for the Central District of California was conditionally granted based on a finding of ineffective assistance of counsel, subject to the reinstatement of appellant's appeal. (*Deglado v. Lewis* [No. CV-96-7241-R (RNB)] [copy of orders and ruling in Court of Appeal file].) Based on the U.S. District Court's order, this Court reinstated the appeal, and appointed the undersigned as new counsel.

This appeal is the reinstatement of the appeal from the judgment. Appellant remains under a sentence of 15 years, and is currently incarcerated.

Because of the unusual posture of this appeal; in order to ensure all potentially arguable issues on appeal have been evaluated; in order to ensure appellant's Sixth Amendment right to effective assistance of counsel is maintained in this appeal; and in order for current appellate counsel to fulfill his Sixth Amendment duty of providing proper legal advice to his client (since a successful effort to challenge a plea of guilty in this case could subject appellant to a potentially higher sentence, *see, e.g., People v. Aragon* (1994) 11 Cal.App.4th 749, 759-760; *People v. Romanoski* (1984) 157 Cal.App.3d 353, 363) [withdrawal of guilty plea waives double jeopardy

protection against higher sentence on appeal]), appellant would respectfully ask that the record be augmented as follows:[1]

A. Supplemental Clerk's Transcript

1. All certificates of probable cause to appeal, with accompanying applications. The U.S. Magistrate's Recommended Ruling refers to a request by trial counsel for a certificate of probable cause to appeal, and a grant of the certificate of probable cause, on an issue which appears to go to the voluntariness of appellant's plea. (Rec. Ruling filed 5/28/97, p. 16-17 & fn. 6.) The certificate would directly affect the issues appellate counsel could raise on appeal, under Rule 31(d) and Penal Code

---

[1] In requesting this extensive set of materials for a case that was originally disposed of by a *Wende* brief and no-issue ruling, appellant does not make any argument concerning any prior action in this appeal or whether any such action was inappropriate. (That would seem irrelevant here, with the appeal having been reinstated.) Current appellate counsel is operating with the benefit--and the burden--of the U.S. District Court's ruling. The District Court has identified specific issues which it apparently expects current appellate counsel to explore, so it is very easy for the undersigned to follow the District Court's identification of issues, which is a benefit that no one had in the prior appeal. However, the undersigned counsel also feels he has no choice but to evaluate those issues, because of the explicit nature of the District Court's ruling. That does not necessarily mean these issues will end up being briefed on appeal. But if appellate counsel ends up rejecting a potential issue identified by the District Court, he would want to do so with a full understanding of what that issue would have been and why it is appropriate to reject it.

It is also fairly clear that this appeal has the potential of being further scrutinized by the District Court if the matter gets that far again. In that light, appellate counsel would consider it prudent to err on the side of caution and overinclusion in any event.

Because of the extensive nature of this request and the multi-defendant nature of this case, appellate counsel would note here for the benefit of the Superior Court Clerk's Office that he would extend his full cooperation to that office in clarifying any items as to which the Clerk's Office is unclear.

section 1237.5, and thus would be an important document in this appeal. The application for the certificate would be important as well, in that it would indicate an issue that trial counsel and the trial court found arguably nonfrivolous, which appellate counsel would be required to evaluate.

The certificate of probable cause is part of the normal record on appeal under Cal. R. Ct. 33(a)(1)(a).

2. All motions to suppress under Penal Code section 1538.5, and other motions addressed to the search warrant, with supporting and opposing papers, and any joinder by appellant's trial counsel. (Motion heard January 18, 1995.) The District Attorney stipulated to appellant's standing to join these motions (CT 96); thus, the motions are deemed to have been made by appellant.

As a result, all moving papers for the section 1538.5 and related motions are part of the normal record on appeal under Cal. R. Ct. 33(a)(1)(*I*). There is a potential issue as to whether appellant waived his right to appeal the denial of the section 1538.5 motion in conjunction with his plea, which appellant may have to address, although there are also potential issues as to whether appellant understood what he was waiving; since as the U.S. District Court found in its Ruling, there are potential issues as to the voluntariness of appellant's plea, as to which the trial court apparently granted a certificate of probable cause. (Rec. Ruling at pp. 16-17 & fn. 6.) If there is an argument that such appeal was not waived, or that the plea was involuntary, then appellant needs the section 1538.5 documents in the record to be able to raise the issue on its merits.

Note: Other defendants' moving papers may be found in the other defendants' files, apparently under the same Superior Court docket number [though under different sub-numbers].

3. All motions to sever, disclose confidential informants or reveal the contents of search warrants, and quash and traverse search warrants,

with supporting and opposing papers, and any joinder by appellant's counsel. These were the other motions heard on the same day and at the same time as the section 1538.5 motion, and are requested for the reasons in Item (2) above.

4. All motions under Penal Code section 995, with supporting and opposing papers, and any joinder by appellant's trial counsel. (Motion heard January 13, 1995.) The minute order for that date states that appellant joined in the other defendants' motions (CT 94); thus, the motions are deemed to have been made by appellant. As a result, all moving papers for the section 995 motion are part of the normal record on appeal under Cal. R. Ct. 33(a)(1)(*I*). Appellate counsel also requests the papers in order to be able to evaluate possible trial defenses, based on his need to advise his client intelligently with respect to a possible challenge to his plea, since a successful challenge to the plea could subject appellant to a higher sentence if the case was eventually tried.

Note: Other defendants' moving papers may be found in the other defendants' files, apparently under the same Superior Court docket number [though under different sub-numbers].

5. All statements in mitigation, statements in aggravation, and other documents pertaining to sentencing as to appellant. If these documents exist, they would be part of the normal record on appeal under Cal. R. Ct. 33(a)(1)(*I*) or part of the optional record on appeal under Cal. R. Ct. 33(b)(1).

If the documents exist, they would also be necessary as part of an issue on appeal that the U.S. District Court specifically raised in the Recommended Ruling (adopted as the Court's final ruling), namely, trial counsel's failure to appear on his client's behalf at sentencing, and his action in turning his client over to a co-defendant's counsel who appeared to have a conflict of interest. (*See* Rec. Ruling, pp. 15-16 & fn. 5.)

What type of presentation trial counsel made on his client's behalf for sentencing purposes is an integral part of that issue, and any statements in mitigation by appellant's trial counsel would directly affect that issue. Any statements in aggravation by the People would be requested in order to evaluate the issue fully. [Note: Statements in aggravation by the People could possibly be found in other defendants' files, apparently under the same Superior Court docket number, but under different sub-numbers.]

If there were no statements in mitigation filed by trial counsel, the nonexistence of such documents would also be highly relevant to any issue dealing with trial counsel's failure to represent his client at sentencing. The Superior Court clerk's affidavit stating that no such documents exist would therefore be an important part of the appellate record as well.

6. All statements in mitigation, statements in aggravation, and other documents (including letters) pertaining to sentencing as to defendant Jose Cuevas Jr. (These documents are presumably in the sub-file under this Superior Court docket number pertaining to Mr. Cuevas.)

These documents pertain to the same potential issue raised in the Magistrate Judge's Recommended Ruling, which was adopted by Judge Real as the basis for the U.S. District Court's conditional grant of habeas corpus.

The District Court noted that appellant's trial counsel did not appear on his behalf at sentencing. Rather, a "special appearance" was made for appellant at sentencing, by the trial attorney for defendant Jose Cuevas Jr., who made no argument and no statement in mitigation, and merely submitted the case. The Recommended Ruling noted as part of this issue that this co-defendant's attorney appeared to have a conflict of interest. (*See* Rec. Ruling at pp. 15-16 & fn. 6.)

Based on appellate counsel's independent review of the record, it does appear that co-defendant's counsel who appeared for appellant at sentencing may in fact have had a conflict of interest. The plea agreement

was a package deal for all six defendants, which appeared to involve prison sentences for each. However, co-defendant's counsel proposed a novel sentencing arrangement for her client, by which her client would get probation--even though the offense was presumably probation-ineligible--and her client's father, also a co-defendant, would serve the prison time that his son would have received had the plea agreement been carried out as expected. The father agreed to serve his son's prison time, and was given a higher sentence. Over the prosecutor's strenuous objection, the trial court accepted that arrangement, and this co-defendant received probation.

Since co-defendant's counsel was fully aware that she was going to seek this extraordinary arrangement for her client, her client's best interests would have been that none of the other defendants received any unusual or unexpected dispositions, to maximize the likelihood that the prosecutor would not seek to undo the entire plea bargain. In other words, it was in co-defendant's counsel's interest that none of the other defendants, including appellant, "rock the boat."

Thus when co-defendant's counsel made her "special appearance" for appellant, it was in her client's best interest that she say nothing at all on appellant's behalf, because it was in her client's best interest that appellant not receive a mitigated disposition. This raises a significant possibility that trial counsel not only failed to perform his role as counsel for his client's sentencing, but he turned his client's sentencing over to an attorney who had a conflict of interest. These present a potential issue on appeal that appellate counsel must explore in light of the U.S. District Court's ruling.

Because the above documents would shed light on whether and to what extent co-defendant's counsel may have had a conflict of interest, appellant respectfully requests that they be augmented into the record here. The current Reporter's Transcript does indicate that such statements in mitigation exist. (RT 67.)

B. Supplemental Reporter's Transcript

7. Reporter's transcript of proceedings, January 13, 1995. (Proceedings before Hon. Patrick J. Morris, court reporter L. Meekins; *see* Minute Order, Clerk's Transcript, p. 94.)

These are the oral proceedings on the section 995 motion. Appellant requests that these be augmented into the record for the same reasons as set forth in Item (4), above.

8. Reporter's transcript of proceedings, January 18, 1995. (Proceedings before Hon. Patrick J. Morris, court reporter D. Alvino; *see* Minute Order, Clerk's Transcript, pp. 95-96.)

These are the oral proceedings on the section 1538.5 and related motions. Appellant requests that these be augmented into the record for the same reasons as set forth in Items (2)-(3), above.

9. Reporter's transcript of proceedings, February 24, 1995. (Proceedings before Hon. Patrick J. Morris, court reporter L. Meekins; *see* Minute Order, Clerk's Transcript, p. 98.)

One of the issues discussed in the federal District Court's ruling was the voluntariness of appellant's plea, as to which, according to the District Court's ruling, trial counsel applied for and the trial court granted a Certificate of Probable Cause. (Rec. Ruling, pp. 16-17, fn. 6.) This transcript would be directly relevant to that issue, because the minute order for that date says: "Deft. rejects offer--if def. wishes to accept Atty to notify DA by 3-3-95." (CT 98.) The fact that defendant rejected a plea offer a few days before his plea would be directly relevant to any issue pertaining to the voluntariness of appellant's plea. Accordingly, appellant would request the transcript.

10. Reporter's transcript of proceedings, April 19, 1995. (Proceedings before Hon. Patrick J. Morris, court reporter D. Alvino.) This appears to have been a routine postplea continuance of proceedings for

sentencing. Because any proceeding after the plea may shed relevance on the voluntariness of the plea, and to complete the record on any such potential issue, appellant would respectfully ask that a transcript of this proceeding be made available as well.

All of the materials above are requested in order to ensure appellate counsel can properly discharge his Sixth Amendment duties to his client, and that the defendant's right to a meaningful appeal is protected under the Fourteenth Amendment.

C. Request for Extension of Time

Appellant respectfully requests that the time for filing the opening brief be extended to 30 days after the filing of the supplemental record, in order to ensure that appellate counsel has an adequate opportunity to review these materials and incorporate them into the opening brief if appropriate, and to counsel his client based on a review of the full record.

For these reasons, appellant would respectfully request that his motion be granted, and that the time for filing the appellant's opening brief be extended to 30 days after the filing of the supplemental record.

Dated: October 11, 1997.

Respectfully submitted,

Michael B. Dashjian
Counsel for Appellant Jesus Delgado
(Appellate Defenders - Independent Case)

DECLARATION OF SERVICE BY MAIL

I, MICHAEL B. DASHJIAN, declare as follows:

I am an active member of the State Bar of California, over the age of 18 years and not a party to the within action. My business address is 606 Alamo Pintado Rd., Suite 119, Solvang, California 93463. On October 11, 1997, I served the attached Application to Augment the Record on Appeal and for Extension of Time by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail, with postage thereon fully prepaid.

Office of the Attorney General
110 West A Street Suite 700
P.O. Box 85266
San Diego CA 92186-5266

Appellate Defenders, Inc.
233 A Street Suite 1200
San Diego CA 92101

Clerk of the Superior Court (Appeals Unit)
County of San Bernardino
351 N. Arrowhead Ave.
San Bernardino CA 92401

A copy was also sent on this day to the appellant, Jesus Delgado.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed at Solvang, California on this 11th day of October, 1997.

MICHAEL B. DASHJIAN

Appendix D

Petitioners' Objection To Respondent's Motion To Augment The Record In The State Court of Appeal After Grant Of Habeas

(See Answer To Petition, p. 21)

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
LAURA WHITCOMB HALGREN
Supervising Deputy Attorney General
SABRINA Y. LANE
Deputy Attorney General
State Bar No. 167819

P.O. Box 85266
110 West A Street, Suite 1100
San Diego, California 92186-9961
Telephone: (619) 645-2565

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,	E016476
Plaintiff and Respondent,	S.C. No. FSB 05856
v.	
MICHAEL RAY FOSTER	
Defendant and Appellant.	

OPPOSITION TO APPELLANT'S MOTION TO AUGMENT THE RECORD ON APPEAL

TO THE HONORABLE MANUEL RAMIREZ, PRESIDING JUSTICE, AND TO THE HONORABLE JUSTICES OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO:

Appellant requests that this Court augment the Clerk's Transcript on appeal to include the following: all certificates of probable cause and accompanying applications, all motions to suppress evidence and other motions relevant to the search warrant,

all motions to sever, disclose confidential informants or reveal the contents of search warrants, and quash and traverse search warrants, all motions under Penal Code section 995, and all statements in mitigation, aggravation, and other documents pertaining to sentencing for appellant and codefendant Jose Cuevas, Jr. Appellant requests that this Court augment the Reporter's Transcript on appeal to include the following: the oral proceedings on the Penal Code section 995 motion, the oral proceedings on any motion to suppress evidence, any oral proceedings regarding appellant's rejection of the prosecution's offer to plead guilty, and oral proceedings for a post-plea continuance of sentencing.

Augmentation of the appellate record is available for portions "of the original superior court file . . . ." (California Rules of Court, rule 12.) In order to justify augmentation of the record on appeal, a litigant must signify with some certainty how materials not included in the normal transcript may be useful on appeal. (*People* v. *Gaston* (1978) 20 Cal.3d 476, 482, citing *People* v. *Hill* (1967) 67 Cal.2d 105, 124.)

Here, the Certificate of Probable Cause and application are included in the Supplemental Clerk's Transcript. (Supp. CT 1-2.) Thus, there is no need for augmentation to include these documents. Respondent does not oppose augmentation to include any motions to suppress evidence. (See Cal. Rules of Court, rule 33(a)(1)(l).) Respondent does not oppose augmentation to include any written motion <u>made by the defendant</u>, as those items are regularly included in the Clerk's Transcript. (See Cal. Rules of

Court, rule 33(a)(1)(l).) However, appellant fails to establish how motions brought by coparticipants would be relevant to appellant's appeal. Thus, respondent opposes augmentation to include written motions brought by coparticipants in which appellant did not join. In light of the district court's ruling, Respondent does not oppose augmentation to include statements in aggravation or mitigation pertaining to appellant or codefendant Cuevas, Jr.

Respondent opposes augmentation to include the oral proceedings on the section 995 motion, as these proceedings are not normally included in the Reporter's Transcript, and appellant fails to identify how the oral proceedings would be of assistance on appeal. Furthermore, the section 995 motion occurred prior to the guilty plea. Respondent does not oppose augmentation to include the oral proceedings of any motion to suppress evidence that appellant brought or joined. In light of the district court's ruling, respondent does not oppose augmentation to include any oral proceedings of appellant's rejection of the prosecution's offer to plead guilty, or any oral proceedings of a continuance of the sentencing hearing.

Based on the foregoing, respondent respectfully requests that appellant's request for augmentation be denied in part and granted in part.

DATED: October 17, 1997, San Diego, California.

SABRINA Y. LANE
Deputy Attorney General

SD95DA1130

DECLARATION OF SERVICE BY MAIL

Case Name: People v. Michael Ray Foster No. E016476

I declare:

I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, California 92186-5266.

On October 17, 1997, I served the attached

OPPOSITION TO APPELLANT'S MOTION TO AUGMENT THE RECORD ON APPEAL

in said cause, by placing a true copy thereof enclosed by depositing it in the internal mail collection system at the Office of the Attorney General, 110 West A Street, Suite 1100 P.O. Box 85266, San Diego, California 92186-5266, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

Michael B. Dashjian (2 copies)
Attorney at Law
606 Alamo Pintado Rd., Suite 119
Solvang, CA 93463

Appellate Defenders, Inc.
233 A Street, Suite 1200
San Diego, California 92101

I caused a true and correct copy of the above document to be deposited with (1) the Clerk of the Court from which the appeal was taken, to be delivered by said Clerk to the Judge who presided at the trial of the cause in the lower court, and (2) a copy to the District Attorney for the County of San Bernardino.

I declare under penalty of perjury the foregoing is true and correct, and this declaration was executed at San Diego, California, on October 17, 1997.
(Date)

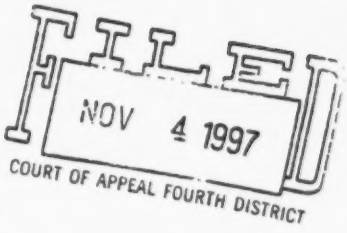
Anna Herrera
(Typed Name)

Anna Herrera
(Signature)

Appendix E

State Court of Appeal's Order Granting Respondent's Motion To Augment The Record After Grant Of Habeas
(See Answer To Petition, p. 21)

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO



PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	E016476
v.	)	(Super. Ct. No. FSB5856)
JESUS GARCIA DELGADO, Defendant and Appellant.	)	County of San Bernardino

THE COURT

This court has read and considered appellant's motion filed October 14, 1997, to augment the record on appeal, the respondent's opposition to the motion, and the appellant's reply to the opposition. The court has determined that this entire request is reasonable, based on appellant's motion and reply and the decision of the federal court in its writ of habeas corpus. The motion is GRANTED, and the superior court clerk is DIRECTED to file with the clerk of this court, on or before 45 days following the date of this order, supplemental clerk's and reporter's transcripts of the documents and oral proceedings described in the motion, a copy of which is attached to this order. The superior court clerk is also DIRECTED to notify the reporter or reporters of this order within five days of its date and to furnish counsel of record with copies of the augmentation.

Appellant is GRANTED an extension to serve and file the appellant's opening brief on or before 30 days following the filing of the augmentation with this court.

RAMIREZ

Presiding Justice

cc: See attached list

COPY

No. 99-451

Supreme Court, U.S.
FILED
OCT 2 8 1999
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

GAIL LEWIS, WARDEN, et al., Petitioners

v.

JESUS GARCIA DELGADO, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL AFFIDAVIT OF COUNSEL RE: MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Michael B. Dashjian, declare as follows:

1. I am counsel of record for respondent Jesus Garcia Delgado in this Court. I am a member of the Bar of this Court.

2. This affidavit is filed in further support of respondent's motion for leave to proceed *in forma pauperis,* filed with this Court on October 18, 1999.

3. Respondent's motion for *in forma pauperis* status was originally made in accordance with this Court's Rule 39.1, which does not require an affidavit or declaration from the party if counsel was appointed for the party by a United States Court of Appeals

under the Criminal Justice Act. (As stated in my previous affidavit, the Court of Appeals did appoint counsel for respondent below under the CJA.) However, out of prudence and caution, and to provide this Court with relevant information, I sought to obtain an affidavit from respondent nonetheless. I had hoped to file that affidavit simultaneously with the *forma pauperis* motion, but was delayed because of the need to get the translation, and also because respondent was transferred to a different custodial facility and it took some time for me to find that out.

4. Since I now have respondent's affidavit, I wish to submit it in further support of his *in forma pauperis* motion. This affidavit and those attached are respectfully submitted for consideration along with the papers originally filed in support of the motion.

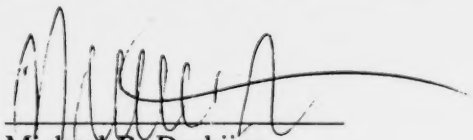
5. I was informed when I was originally appointed to be counsel for respondent, in his state court appeal, that respondent would require a Spanish-language translator. A Spanish-language interpreter had been appointed for respondent in the Superior Court proceedings. My communications with respondent for both the state and federal court proceedings have been entirely through a Spanish-language translator.

6. As a result, I arranged for translation into Spanish of an affidavit in further support of a motion for *in forma pauperis* status. The attached documents are the original English-language version of the affidavit (Exh. A); a Spanish-language translation of the affidavit with respondent's answers (Exh. B); and an affidavit of the translator, Carlos Gaudy (Exh. C). I have utilized Mr. Gaudy's Spanish translation services on a regular basis over the past two years or so.

7. Mr. Gaudy verified to me that respondent's answer to question 1(b) on the Spanish-translated affidavit translates to "1993 - 200=000, pesos per week in Mexico." Mr. Gaudy informed me that the notation "200=000, pesos" has no monetary significance in Spanish, and that 200 pesos might be properly abbreviated "200,00 pesos." Mr. Gaudy stated that he assumes respondent's answer refers to 200 pesos per week in 1993.

8. Mr. Gaudy also verified that respondent's answer to question 5 on the Spanish-translated affidavit translates to "My wife Efigenia and my mother Carmen."

I declare under penalty of perjury of the laws of the United States that the foregoing is true and accurate to the best of my personal knowledge. Executed on this 27th day of October, 1999.



Michael B. Dashjian
P.O. Box 512
San Luis Obispo CA 93406-0512
Telephone: (805) 460-0300
Facsimile: (805) 460-0349

Counsel of Record for Respondent

Exhibit A

Original English-Language Version Of The Affidavit

No. 99-451

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

GAIL LEWIS, WARDEN, Petitioner

v.

JESUS GARCIA DELGADO, Respondent

AFFIDAVIT IN SUPPORT OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Jesus Garcia Delgado, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees or costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes _____ No _____

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

_____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

_____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

_____

_____

3. Do you own any cash or checking or savings account [include any funds in prison accounts]? Yes _____ No____

a. If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No _____

a. If the answer is yes, describe the property and state its approximate value.

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

_____

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this

_____ day of _____, 1999.
[day] [month]

_____
Jesus Garcia Delgado

Exhibit B

Spanish-Language Translation Of The Affidavit, With Respondent's Answers

No. 99-451

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

GAIL LEWIS, WARDEN, Petitioner

v.

JESUS GARCIA DELGADO, Respondent

DECLARACIÓN JURADA EN APOYO DE LA MOCIÓN
DE AUTORIZACIÓN PARA PROCEDER EN FORMA PAUPERIS

Yo, Jesús Garcia Delgado, habiendo sido primero debidamente juramentado, depongo y digo que soy el apelado en el caso más arriba titulado, que en apoyo de mi moción para proceder sin el requerimiento de pagar por adelantado cuotas o costos, o dar garantía para eso, declaro que debido a mi pobreza soy incapaz de pagar los costos de tales procedimientos o dar la garantía para eso, y que yo creo que tengo derecho a reparación.

Además juro que mis contestaciones a las preguntas e instrucciones debajo, relacionadas con mi habilidad para pagar el costo de proceder en esta corte, son verdad;

1. ¿Está usted actualmente empleado? Si ____ No X

   a. Si la respuesta es si, declare la cantidad de su salario o paga por mes y dé el nombre y dirección de su patrón.

b. Si la respuesta es no, declare la fecha de su último empleo y la cantidad de su salario y paga por mes que usted recibió.
1993- 200=000, pesos por semana. en México.

2. ¿Ha recibido usted, dentro de los últimos doce meses, algún ingreso de un negocio, profesión u otra forma de empleo propio, o en forma de pagos de renta, interés, dividendos, u otra fuente?
NO

3. ¿Tiene usted algún dinero en efectivo o cuenta bancaria o de ahorro (incluya cualquier fondo en las cuentas de la prisión)? Si ___ No X

a. Si la respuesta es si, declare el valor total de los artículos poseídos.

4. ¿Posee usted bienes raíces, acciones, bonos, pagarés, automóviles, u otra propiedad valiosa (excluyendo los muebles comunes de la casa y ropa)?
Si ___ No X

a. Si la respuesta es si, describa la propiedad y declare su valor aproximado.

5. Liste a las personas que dependen de usted para su sostén y mencione su relación con esas personas.
Mi, Esposa Efigenia. i mi mama carmen,

Declaro bajo penalidad de perjurio de las leyes de los Estados Unidos que lo previo es verdad y correcto. Esto fue efectuado el día 21 de Octubre de 1999,
(día) (mes)

Jesus Garcia Delgado

Exhibit C

Affidavit Of Translator

No. 99-451

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

GAIL LEWIS, WARDEN, Petitioner

v.

JESUS GARCIA DELGADO, Respondent

AFFIDAVIT OF TRANSLATOR

I, Carlos Gaudy, being first duly sworn, depose and say that I received the attached document entitled "Affidavit in Support of Motion for Leave to Proceed In Forma Pauperis" from Michael E. Dashjian, Attorney at Law; that I translated it from English to Spanish to the best of my ability; and that the document in the above case entitled "DECLARACIÓN JURADA EN APOYO DE LA MOCIÓN DE AUTORIZACIÓN PARA PROCEDER EN FORMA PAUPERIS" is to the best of my ability a true and accurate translation of the "Affidavit in Support of Motion for Leave to Proceed In Forma Pauperis." I further depose and say that my occupation is as a Spanish language interpreter and translator, and that I am certified by the Judicial council of the State of California to work as an interpreter in the California courts.

I declare under penalty of perjury of the laws of the United States that the above is true and correct. Executed this 4th day of October, 1999.

[signed] Carlos Gaudy

Judicial Council ID# 21983179

No. 99-451

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

GAIL LEWIS, WARDEN, Petitioner

v.

JESUS GARCIA DELGADO, Respondent

DECLARACIÓN JURADA EN APOYO DE LA MOCIÓN
DE AUTORIZACIÓN PARA PROCEDER EN FORMA PAUPERIS

Yo, Jesús Garcia Delgado, habiendo sido primero debidamente juramentado, depongo y digo que soy el apelado en el caso más arriba titulado, que en apoyo de mi moción para proceder sin el requerimiento de pagar por adelantado cuotas o costos, o dar garantía para eso, declaro que debido a mi pobreza soy incapaz de pagar los costos de tales procedimientos o dar la garantía para eso, y que yo creo que tengo derecho a reparación.

Además juro que mis contestaciones a las preguntas e instrucciones debajo, relacionadas con mi habilidad para pagar el costo de proceder en esta corte, son verdad;

1.- ¿Está usted actualmente empleado? Sí ____ No ____

a. Si la respuesta es sí, declare la cantidad de su salario o paga por mes y dé el nombre y dirección de su patrón.

_____

_____

b. Si la respuesta es no, declare la fecha de su último empleo y la cantidad de su salario y paga por mes que usted recibió.

_____

2. ¿Ha recibido usted, dentro de los últimos doce meses, algún ingreso de un negocio, profesión u otra forma de empleo propio, o en forma de pagos de renta, interés, dividendos, u otra fuente?

_____

_____

3. ¿Tiene usted algún dinero en efectivo o cuenta bancaria o de ahorro (incluya cualquier fondo en las cuentas de la prisión)? Sí ___ No ___

a. Si la respuesta es sí, declare el valor total de los artículos poseídos.

_____

4. ¿Posee usted bienes raíces, acciones, bonos, pagarés, automóviles, u otra propiedad valiosa (excluyendo los muebles comunes de la casa y ropa)?
Sí ____ No ____

a. Si la respuesta es sí, describa la propiedad y declare su valor aproximado.

_____

_____

5. Liste a las personas que dependen de usted para su sostén y mencione su relación con esas personas.

_____

Declaro bajo penalidad de perjurio de las leyes de los Estados Unidos que lo previo es verdad y correcto. Esto fue efectuado el día _____ de _____ de 1999,

(día) (mes)

_____
Jesus Garcia Delgado